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U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

15463

NUMBER

Division B

THOMAS J. SMITH,

Plaintiff

vs.

ST. TAMMANY PARISH SCHOOL BOARD,
A Corporation, and I. F. PARKER,
President and WILLIAM PITCHER,
Superintendent,

Defendants

* *

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION:

COMPLAINT

1. Jurisdiction

Jurisdiction is based on:

A.) The due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

B.) Title 28 U. S. Code Section 1343 (3) and (4) which provides original jurisdiction in U. S. District Courts in actions for deprivation of rights, privileges and immunities secured by the United States Constitution and Acts of Congress providing for equal rights of all citizens.

C.) Title 42 U. S. Code Section 1981 which provides that all persons shall have the same right to the full and equal benefit of all laws for the security of persons and property.

D.) Title 42 U. S. Code Section 1983 which provides for suits at law or equity by persons who under color of State Statute who are deprived of rights, privileges or immunities secured by the U. S. Constitution and Laws.

E.) Title 42 U. S. Code Section 1985 (3) which provides an action in damages against those who cause to be done any act in furtherance of a conspiracy to deprive, directly or indirectly any class of persons of the equal protection of the laws of the equal privileges and immunities under the laws.

F.) Title 42 U.S. Code Section 1986 which provides for an action in damages against persons having knowledge of conspiracies mentioned in 42 U. S. 1985 and neglects or refuses to prevent or aid in preventing said conspiracy.

G.) Title 42 U. S. Code Section 1988 which provides for use of the common law as modified by the States where the U. S. Laws are not suitable.

H.) Title 28 U. S. Code Section 1331 which provides for original jurisdiction in Civil Actions in controversies over $10,000.00.

I.) Rule 23 (A)(3) Federal Rules of Civil Procedure which provides for class actions.

J.) Rule 65 (B) Federal Rules of Civil Procedure which provides for ex parte Temporary Restraining Orders.

2. Nature Of Cause Of Action

This is a class action on behalf of plaintiff and all other Negroes similarly situated for damages and for an Ex Parte Temporary Restraining Order, Preliminary and Final injunctions prohibiting the furtherance of a proposed School Board Bond Issue until defendants file with this court a fair and equitable plan for desegregation of the said school district, and for the maintenance of said school system without regard to race, color, creed or national origin, which plan shall be caused to go into effect no later than the opening of the next session of said school district.

3. Plaintiff

Plaintiff, T. J. Smith, is an adult male, Negro, citizen of the United States, and the State of Louisiana and is domiciled in the Parish of St. Tammany. Plaintiff is a registered voter, taxpayer and father of children attending the Public Schools of St. Tammany Parish.

4. Defendants

Defendant, St. Tammany Parish School Board is a Public Body Corporate organized and existing under the laws of the State of Louisiana, I. F. Parker is the President of said School Board and William Pitcher is the Superintendent of St. Tammany Parish Schools. The School Board herein is charged by the laws of the State of Louisiana with the duty of operating systems of free public schools in said parish and they are presently so doing. The said school board is sued in its corporate capacity and the President and Superintendent are sued in their official capacity.

5. Facts

Defendants, acting under color of the laws of Louisiana, have pursued for some time and are presently pursuing a policy, practice, custom and usage of operating the public school systems in St. Tammany Parish, Louisiana on a racially segregated basis. Defendants maintain and operate compulsory biracial school systems by the use of dual school zones or attendance areas; defendants make initial assignments of students to the public schools under their control on the grounds of race and color. Principals, teachers and other professional personnel under defendants' jurisdiction are likewise assigned to the schools on the basis of race and color. Students initially assigned to elementary schools designated as "white" are thereafter assigned solely to high schools similarly designated. Students assigned initially to elementary schools denominated as Negro, are thereafter assigned solely to high schools similarly designated. In no case are the assignments of either students, teachers, principals or other professional personnel of the white race made to schools designated as Negro nor are assignments of students, teachers, principals or other personnel of the Negro race assigned to schools designated as white. Defendants also discriminate against plaintiff herein and the members of the class represented by him in school construction, the formulation of budgets, and the disbursement of school funds. Specifically, defendants construct elementary and high schools with reference to the maintenance of compulsory biracial school systems. Defendants herein also limit participation in extracurricular activities in the schools to one or the other race, separately.

6. None of the schools in St. Tammany Parish are integrated. There are 21 white schools with 6,551 white, students in grades 1 to 8, and 2, 171 white students in grades 9 to 12. There are 340 white teachers employed in these schools.

7. There are 8 Negro schools with 2,643 Negro students in grades 1 to 8 and 717 Negro students in grades 9 to 12. There are 132 Negro teachers employed in these schools.

8. On Tuesday, January 5, 1965 a parish wide school bond issue of $1,995,000.00 was voted upon and approved by the property owners of said parish. Bids on the bonds are scheduled to be submitted on April 7, 1965. Attached hereto and made part hereof is a preliminary circular concerning said bonds. The bonds are to be issued for the purpose of acquiring and/or improving lands for building sites and playgrounds including erecting and/or improving school buildings and other related facilities.

9. Plaintiff apprehends and fears that the funds to be secured by the bond issue will be used to perpetuate the discriminatory segregationist practices of the past.

10. Plaintiff alleges that the St. Tammany Parish School Board has an affirmative obligation and duty under the constitution and laws of the United States and decisions thereunder to voluntarily desegregate said schools.

11. Plaintiff alleges that the failure of this school board or any schoolboard to so voluntarily desegregate their schools is a denial of rights guaranteed under the due process and equal protection clauses of the Fourteenth Amendment to the U. S. Constitution and also a violation of 42 U.S. C. 1981, 1983, 1985 (3), and 1986.

12. Plaintiff and the members of the class which he represents are irreparably injured by the acts of defendants complained of herein. The continued operation by defendants of compulsory biracial school systems in the Parish of St. Tammany, Louisiana including the assignment of pupils, teachers, principals and other administrative personnel on the ground of race; the the maintenance of dual zone lines or attendance areas based on race; the operation of the budgets for the schools on the basis of race; the construction of schools on the basis of race, and the programming and planning of extracurricular activities on the basis of race violate the rights of the plaintiff and the members of the class secured to them by the equal protection clause of the Fourteenth Amendment the the Constitution of the United States and the United States Laws and Decisions. This irreparable injury to plaintiff and his class will continue unless and until defendants are enjoined by this Court. Any other relief to which plaintiff and those similarly situated might be remitted would be attended by uncertainty and delay, would involve a multiplicity of suits, cause further irreparable injury and occassion vexation and inconvenience and deny to plaintiff and those similarly situated substantial relief.

WHEREFORE, plaintiff prays that the court sign an Ex Parte Temporary Restraining Order enjoining defendants, their agents, representatives, employees, successors and all persons in active concert with them from:

1.) Continuing to operate compulsory biracial school systems in the Parish of St. Tammany.
2.) Continuing to Maintain dual schemes or patterns of school zone lines or attendence area lines based on race.
3.) Making initial assignments of pupils to the public schools of the parish based on race.
4.) Assigning teachers, principals, and other professional personnel to the public schools on the basis of race.
5.) Approving employment contracts, budgets, and disbursing funds on the basis of race.
6.) Constructing elementary and high schools in the Parish on the basis of dual attendence areas based on race.
7.) Programming and supporting extracurricular activities which are limited solely to one or the other of the races.
8.) Continuing to make any other distinctions in the operation of the Parish schools which are based solely on race.
9.) Doing or have done by others any act furthering the proposed school bond issue approved by the voters on January 5, 1965.

Said Temporary Restraining Order to remain in effect until it expires or until defendants file with the court a fair and equitable plan for desegregation of said school district and maintenance of said desegregated School District which plan shall go into effect no later than the opening of the next school session.

Plaintiff further prays that the court advance this cause on the docket and order a speedy hearing of this action according to law and after such hearing that this Honorable Court enter Preliminary and Permanent Injunctions identical to that prayed for in the Temporary Restraining Order.

Plaintiff further prays for a judgment against defendants in the sum of $15,000.00 for his damages plus attorney fees, expenses and costs.

Plaintiff further prays that if this court directs defendants to submit desegregation plans that the court will retain jurisdiction of this case pending court approval and full and complete implementation of defendants plans.

Plaintiff further prays that this court will grant such other, further, additional or alternative relief as may appear equitable, just, and proper.

RESPECTFULLY SUBMITTED:
ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA
523-5197

BY:_______________________

OF COUNSEL:
CARL RACHLIN
38 PARK ROW
NEW YORK 38, NEW YORK

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority personally came and appeared:

THOMAS J. SMITH

who after first being duly sworn did depose and say that he is the plaintiff in the above and foregoing complaint, that he has read the same and that all the allegations therein contained are true and correct to the best of my information and belief.

THOMAS J. SMITH

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 2ND DAY
OF APRIL, 1965.

NOTARY PUBLIC

AFFIDAVIT IN SUPPORT OF PRAYER FOR TEMPORARY RESTRAINING ORDER

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, theundersigned authority personally came and appeared:

THOMAS J. SMITH

who after first being duly sworn did depose ans say that he is a Negro citizen of the United States and State of Louisiana, domiciled in the Parish of St. Tammany; that he is a homeowner, taxpayer and father of children attending St. Tammany Parish Public Schools; that all public schools in the Parish are and have been for years operated on a segregated and discriminatory basis; that a $1,995,000.00 School Bond Issue was approved by the voters of the Parish on January 5, 1965 and that sealed bids are to be made on April 7, 1965; that affiant apprehends and fears that these funds will be used to perpetuate the unlawful, and unconstitutional Bi-Racial school system and that affiant will suffer immediate irreparable harm if the sale of these bonds is not terminated until the school board files a plan of desegregation for the next school session.

THOMAS J. SMITH

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 2ND DAY OF
APRIL, 1965.

NOTARY PUBLIC

Certified
4 ct

St.
Tammany

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

THOMAS J. SMITH CIVIL ACTION

Plaintiff

vs. NUMBER

ST. TAMMANY PARISH SCHOOL BOARD,
A Corporation; and I. F. PARKER,
President; and WILLIAM PITCHER,
Superintendent.

Defendants

* *

ORDER TO SHOW CAUSE

IT IS ORDERED that Respondents, St. Tammany Parish School Board, I. F. Parker as President, and William Pitcher as Superintendent show cause on the day of 1965 at o' clock .M. why the Temporary Injunction herein prayed for should not immediately issue.

IT IS FURTHER ORDERED that copies of this order to show cause be served upon all parties hereto immediately, and according to law.

NEW ORLEANS, LOUISIANA , 1965.

UNITED STATES JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

THOMAS J. SMITH, CIVIL ACTION
Plaintiff
vs. NUMBER
ST. TAMMANY PARISH SCHOOL BOARD,
A Corporation; and I. F. PARKER,
President and WILLIAM PITCHER,
Superintendent,

TEMPORARY RESTRAINING ORDER

* *

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION:

Whereas in the above named cause it has been made to appear by the verified complaint and supporting affidavit filed herein on the day of 1965, presented to the Honorable , Judge of the United States District Court for the Eastern District of Louisiana, that a restraining order prelimina to hearing upon motion for a preliminary injunction should issu without notice, because immediate and irreparable injury, loss an damage will result to the plaintiff before notice can be served and a hearing had thereon and;

Whereas defendants' unlawful acts of ommission by failing to desegregate the Public Schools in St. Tammany Parish violates the due process and equal protection clauses of the Fourteenth Amendment to the U. S. Constitution, U. S. Laws and decisions;

Whereas notice and hearing before entering a temporary Restraining order should not be required because plaintiff have no adequate remedy at law.

Now, therefore, on motion of plaintiff; IT IS ORDERED that defendants, their officers, agents, representatives, employees, successors and all persons in active concert with them be and the same are enjoined and prohibited from:

1.) Continuing to operate compulsory biracial school systems in the Parish of St.Tammany.

2.) Continuing to maintain dual schemes or patterns of school zone lines or attendence area lines based on race.

3.) Making initial assignments of pupils to the Public schools of the Parish based on race.

4.) Assigning teachers, principals and other professional personnel to the Public Schools on the basis of race.

5.) Approving employment contracts, budgets, and disbursing funds on the basis of race.

6.) Constructing elementary and High Schools in the Parish on the basis of dual attendance areas based on race.

7.) Programming and supporting extracurricular activities which are limited solely to one or the other of the races.

8.) Continuing to make any other distinctions in the operation of the Parish Schools which are based solely on race.

9.) Doing or having done by others any act furthering the proposed school Bond Issue approved by the voters on January 5, 1965

Said temporary restraining order to remain in effect until it expires or until defendants file with the court a fair and equitable plan for desegregation of said School District and maintenance of said Desegregated School District which plan shall go into effect no later than the opening of the next school session.

This restraining order issued at o'clock .M. this

day of 1965.

UNITED STATES JUDGE

U.S. DISTRICT COURT FOR

THE __________ DISTRICT OF LOUISIANA

(Parents)

v.

A - B - C - D et al individually and as
members of the duly constituted School Board of St.
CADDO
Tammany Parish

Plaintiffs, by their attorneys, complaining of the defendants herein allege:

PARTIES

FIRST: Plaintiffs are citizens of the United States and of the State of Louisiana residing in St. Tammany Parish, who are taxpayers in said Parish (if this is the fact) and are the parents of minor children of school age who attend or are about to attend the Public Schools maintained by St. CADDO Tammany Parish and/or the School Board therein with the aid and assistance of the State of Louisiana.

SECOND: Said plaintiffs are Negroes and seek the relief herein in their individual and representative capacities on behalf of themselves, their children and all Negro citizens of the United States, resident in St. Tammany Parish, State of Louisiana, which persons constitute a class so numerous as to make it impracticable to bring all of them before this court, that there are common questions of law affecting the entire class as described herein.

THIRD: The Defendants are the persons constituting the members of the School Board for St. Tammany Parish, State of Louisiana, and have been duly elected (or appointed if this is the fact) pursuant to the laws of the State of Louisiana, and serve in such capacity; within the scope of their duties is the maintenance, construction and operation of all publicly owned schools within such Parish, and also the erection of new schools and supervision over all personnel needed for the purposes of said schools.

JURISDICTION OF THE COURT

FOURTH: Jurisdiction of this Court is based upon:

(A) The United States Constitution and more particularly the 14th Amendment thereto in that plaintiffs, their children and all similarly situated have been deprived of the due process of law.

(B) Similarly, plaintiffs, their children and all similarly situated have been denied equal protection of the laws.

(C) Title 28, U.S. Code § 1343 providing for original jurisdiction in civil actions for deprivation under the color of State law of rights, privileges or immunities granted by the United States Constitution and denial of equal protection of the law.

(D) The amount in controversy exceeds $10,000.

(E) (i) Title 42 U.S. Code 1981

(ii) Title 42 U.S. Code 1983

(iii)Title 42 U.S. Code 1985 (3)

(iv) Title 42 U.S. Code 1986

(v) Title 42 U.S. Code 1988

FACTS

FIFTH: Upon information and belief the defendants in their official capacities as public officials of said [CADDO] St. Tammany Parish, and particularly as members of said School Board, have offered or are about to offer for purchase certain bonds, indentures, securities or other certificates of indebtedness bearing the seal, imprint and approval of St. Tammany Parish and/or the duly elected school board of [CADDO] St. Tammany Parish, of which the Defendants are the members and which bonds, indentures, securities or certificates of indebtedness pledge the credit and the promise to pay of the aforesaid St. Tammany Parish and/or the duly elected School Board of said Parish and which will be paid from funds of the said Parish and/or the said School Board, a substantial part of which will have been contributed by Plaintiffs and others similarly situated as taxpayers of said Parish and the State of Louisiana; the aforesaid bonds, indentures, securities or certificates of indebtedness were authorized as provided by the laws of the State of Louisiana in a referendum held on or about the __________ day of __________. (If this is not the method of setting the bonds in motion we should allege the proper procedure at this point.)

SIXTH: Public announcements issued by or on behalf of Defendants have stated that these bonds and the proceeds therefrom will be used to construct and/or maintain the public school system of St. Tammany Parish, as described above, maintained by the said Defendants constituting the said School Board, its buildings and other property together with the cost of maintaining the same with the knowledge, consent, approval and assistance of the State of Louisiana and the Parish of St. Tammany.

SEVENTH: The said public school system of St. Tammany Parish has been constructed and maintained in a segregated basis with separate schools and facilities for Caucasian and separate schools for Negro persons, all in violation of the equal protection and due process clause of the 14th Amendment to the U.S. Constitution as well as the various sections of Title 42, U.S. Code as referred to in FOURTH above, and that the aforesaid segregated schools have been maintained as the result of the official policy of said Defendants individually and in their capacity as members of said constituted School Board, and official support by the State of Louisiana and Parish of St. Tammany of the illegal custom of segregation of races in the public schools and other aspects of life in said St. Tammany Parish.

EIGHTH: At no time have Defendants or their predecessors in office, in their official capacity, put into effect or attempted to put into effect a fair and reasonable plan as required by the United States Constitution to effectuate the desegregation of the aforementioned officially maintained public school system, and furthermore it has been declared publicly that the schools to be built and/or maintained with the proceeds from these bonds will be built or maintained on a segregated basis.

NINTH; The aforementioned bonds, indentures, securities or certificates of indebtedness whose proceeds will be used by the Defendants herein for the continuance of illegally maintained, segregated public school system will further cause a denial of equal protection of the laws and due process of laws to Plaintiffs, their children and others similarly situated, as well as being unjust, unfair and inequitable.

TENTH: For the reasons aforesaid, the Defendants or any persons acting in concert with them or pursuant to their instruction, or on their behalf, whether as agents, servants, employees or otherwise, have no legal authority to have printed, to sell, offer for sale, distribute in any fashion and accept money from the sale of said bonds, securities, indentures or other certificates of indebtedness, nor can they pledge the credit of the said school board or St. Tammany Parish the proceeds of which bonds, indentures, securities or certificates of indebtedness shall be used to maintain and/or construct publicly maintained schools on such segregated basis as described above.

ELEVENTH: Unless Defendants, their agents, servants, representatives, employees and any persons acting in concert with them or on their behalf be enjoined, restrained, and stayed from advertising for sale, selling, distributing or entering into any agreements to sell or distribute in any form any such bonds, securities, indentures or other certificates of indebtedness, and from pledging the credit of such Defendants, said school board or any of its subdivisions, agencies, or other bodies subject to its control, Plaintiffs and others similarly situated will continue to be denied fair andequal protection of the laws and due process of law, as guaranteed by the 14th Amendment as aforesaid, and will be caused to suffer great harm and indignity as well as suffer monetary damages as citizens of the United States and of Louisiana and as residents of St. Tammany Parish, unless Defendants, prior to the filing of an answer to this complaint, or at such time as may be designated by the Court, file and serve with this Court a fair and equitable plan for the desegregation of the said school system under their authority, and for the maintenance of said school system without regard to race, color, creed or national origin, which plan shall be caused to go into effect no later than the opening of the next session of said publicly maintained schools.

TWELFTH: That no previous request for this or similar relief has been sought by these Plaintiffs.

THIRTEENTH: That Plaintiffs have been forced to suffer damages and to undergo expenses to commence the action herein, which expenses would not have been incurred except for the failure of Defendants to carry out their legal and constitutional duty; that counsel fees and expenses accordingly be awarded to said Plaintiffs in an amount of $15,000.

WHEREFORE: Plaintiffs in their individual capacities, and on behalf of all similarly situated have judgement against the defendants for the relief sought therein and further,

(1) Plaintiffs individually and on behalf of all similarly situated have judgment against Defendants, their agents, servants, representatives and employees and all persons acting for or on behalf of said Defendants, or in concert with them, or pursuant to their direction restraining, enjoining and otherwise prohibiting said Defendants, their agents, servants, representatives and employees from advertising for sale, issuing, printing, selling, offering for sale or distributing in any way or delivering to any person or persons any bond, security, indenture or any other form of certificate of indebtedness pursuant to any purported authority granted pursuant to the referendum dated ________ as set forth more particularly in

#_____________ above, or otherwise, unless and until, prior to the filing of their answer herein, or until such time as this court may designate, Defendants submit to this Court a fair and equitable plan for the forthwith desegregation of the publicly maintained schools under their jurisdiction, which plan shall take effect no later than the opening of the next session of the aforesaid public schools and

(2) Plaintiffs have judgment against Defendants for the sum of $15,000 for their damages herein and for necessary counsel fees and expenses and further

(3) Plaintiffs individually and on behalf of all similarly situated, have judgment for such other and further relief as may be necessary and proper herein.

#

February 24, 1963

Collins, Douglas and Elie, Esqs.
2211 Dryades Street
New Orleans, Louisiana

Dear Bob, Nils and Lolis:

I hope by this time you have had a chance to look over the complaint in the St. Tammany Parish school bond case. I enclose a memorandum of law which I trust will support the application.

In addition, please see the hase of Kramer v. Board of Trustees, 368 S.W. 2d 873, 8 Race Relations Reporter, 361,1034. This case reversed a refusal by the court to give parents an injunction against the erection of school buildings for segregated purposes in Georgetown, Texas. The intermediate court reversed and granted the injunction in favor of the parents. By the time the case went to the highest Texas court the School Board gave in and agreed to desegregate the schools in question, so that the case became moot in Texas courts.

Dave Dennis has told me that he will discuss with you the plaintiffs in the case. The sooner the case begins the better. April 1 is the absolute deadline, since the bonds will be sold a day or two thereafter. We ought to serve a complaint and announce it to the financial world promptly. I was glad to see you at the conference, but was sorry that Nils was not able to come. I have learned how the Inc. Fund learned of our idea for a statewide suit, which I will discuss with you when I see you.

Best regards,

CARL RACHLIN
General Counsel

CR:jp

copy to
Dennis

cc: Mr. David Dennis
2209 Dryades Street
New Orleans, Louisiana

Dear Bob, Nils & Lolis
~~the~~ How are we doing on the
St. Tammany Parish Bond case?

a national organization with affiliated local groups working

CONGRESS OF
CORE
RACIAL EQUALITY

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
COrtlandt 7-6270

James Farmer
national director
Richard Haley
associate
Gordon Carey
assistant
Carl Rachlin, Esq.
general counsel

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director of organization
Marvin Rich
community relations director

MAR 1 5 1965

March 8, 1965

Collins, Douglas and Elie, Esqs.
2211 Dryades Street
New Orleans, Louisiana

Dear Bob, Nils and Lolis:

How are we doing on the St. Tammany Parish Board case?

Regards.

Sincerely,

Carl

Carl Rachlin, Esq.
General Counsel

CR:JG

cc: Mr. David Dennis

Dear Carl – Dave has been out of the state almost the whole time since we got the papers from you How are you doing on the $3,383.00 that C.O.R.E. presently owes us?

Regards
Bob, Nils and Lolis

OK to file
3/25

March 15, 1965

Mr. David Dennis
CORE Southern Office
2209 Dryades Street
New Orleans, Louisiana

Dear Dave,

I know how busy you have been since I have heard from George Wiley and Marv Rich about some of the activities in Jonesboro. Unfortunately, time presses us very badly in regard to the St. Tammany Parish school bond case. Unless you are able to obtain plaintiffs as we discussed about a month ago, i.e. parents of school children in the area, we shall find it difficult to go ahead. Since it is a unique type of affirmative action, this would be a sad defeat.

By the way, I learned Saturday morning that you were thinking of a school case in Jonesboro. I wish you had called me when you first started to think about it because we then could have gotten the wheels in motion a lot sooner. It wasn't until Saturday morning that I [illegible] to Jesse Stone and instructed him to take all defensive and [illegible] steps necessary to protect the people in Jonesboro. But even at that time no one had advised me that you were interested in a school case. I know how busy you are but it would help us all if you only have time for a telephone and not a letter.

By the way, immediately after you asked me to get a voter case going in South Carolina, I assembled a group of lawyers, able young [illegible] and got them started—in fact put them in touch with Jim [illegible] with particular reference to proceeding immediately in the [illegible] [illegible] district. We were all set to [illegible] a little further [illegible] but [illegible] advised us that there was no trouble in registering people in that district. If anything, the difficulty was in getting people to come to register. However, he did say that other parts of the state might require a law-suit and we will work closely with him on this.

I look forward to seeing you soon.

Sincerely yours,

[illegible]

cc: George Wiley
Marvin Rich
Collins, Douglas & Elie
[illegible]

Louisiana

March 17, 1965

Mr. David Dennis
CORE Southern Office
2209 Dryades Street
New Orleans, Louisiana

Dear Dave,

I am awfully glad you called and I agree that it is important that I come to Louisiana and meet with you and Dick Haley, Collins, Douglas & Elie, as well as Stone, Sharp and Berry and also Murphy Bell, if at all possible, so that we make sure that our legal procedures are understood by all of us.

Clearly C, D & E are in charge of CORE's legal affairs in Louisiana and obviously, when help is required any place in the state, they should be consulted in the first instance. They have good relationships with the lawyers and it is important that these be continued. I, of course, will always be ready to consult, to come to Louisiana, to assist in the preparation of cases and the trials and appeals at any and all time.

As to the St. Tammany Parish suit, I guess the short conversation we had at the Legal Conference did not make sufficiently clear who the plaintiffs should be. I thought I had, but apparently in the short conversation, it wasn't fully understood. The plaintiffs should be parents of school children in the parish and, in addition, if possible though not essential, property owners. Time is of the essence since the bond will be issued very shortly after April 1st, 1965.

This could be an important action. Obviously, the remedy is unknown, but we want to try a new approach to the school problem. Please do all you can to give Bob, Nils and Lolis the necessary information.

I have asked Bob and Nils to set up a meeting if possible Sunday of this week to meet with the lawyers and I would spend Monday with them planning the final arrangements on St. Tammany Parish.

With best regards and my love to Mattie,

[illegible]
[illegible]

cc: Collins, Douglas & Elie
Mr. Richard Haley
Mr. George Wiley
[illegible]

MEMBERS
New York Stock Exchange
American Stock Exchange
Midwest Stock Exchange
Chicago Board of Trade
Chicago Mercantile Exchange
New York Mercantile Exchange
New York Cocoa Exchange
New York Coffee & Sugar Exchange
New York Produce Exchange
New York Cotton Exchange
New Orleans Cotton Exchange
Memphis Cotton Exchange
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Commodity Exchange, Inc.

Kohlmeyer & Co.
217 CARONDELET STREET / NEW ORLEANS 70130 / TELEPHONE 522-5761
NEW ORLEANS / NEW YORK / CHICAGO / ST. LOUIS / CLAYTON / BIRMINGHAM / HUNTSVILLE
MEMPHIS / LAFAYETTE / LAKE CHARLES / MACON / JACKSON / GREENWOOD

March 23, 1965

Mr. Robert F. Collins
2211 Dryades Street
New Orleans, Louisiana

Dear Mr. Collins:

We enclose herewith our Preliminary Circular covering $1,195,000 St. Tammany Parish, Louisiana, Parishwide School District No. 12 Bonds, Dated May 1, 1965.

Yours very truly,

KOHLMEYER & CO.

Robert R Wolf

Robert R. Wolf

RRW:ls

Enclosure

[illegible]

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

TELEPHONE
(504) 523-5197

MAR 26 1965

March 24, 1965

Mr. Carl Rachlin
CORE
38 Park Row
New York 38, New York

Dear Carl:

Enclosed herewith is a copy of a Kohlmeyer & Co Preliminary Circular for your information. The CORE Southern Region Office still has not produced a plaintiff. A thought has recently occurred to me. How are we going to handle the question of the bond required in the injunction or TRO situation and the defense of a possible suit for damages brought against our plaintiff by the school board?

Yours sincerely,

COLLINS, DOUGLAS & ELIE

BY: Robert F. Collins

RFC/vmg

ENCLS: 2

418

March 31, 1963

Robert Collins, Esq.
2211 Dryades Street
New Orleans, Louisiana

Re: St. Tammany Parish

Dear Bob,

I think we should proceed in the St. Tammany case.

Please check before you file the complaint as to whether they have desegregated the schools during the time since we last looked. If there is a bond, we will decide what to do, depending upon what the court sets as a figure. Hopefully, we give an out to the court by our alternative request for relief, i.e. enjoin the bond unless they desegregate. Maybe I am an optimist, but I believe they will come in with a plan and we will be arguing over that.

Hope you received SCEF money. I have been pushing hard.

Regards,

Carl Rachlin
General Counsel

cc: Mr. Richard Haley

CR:bdl

HAYS, ST. JOHN, ABRAMSON & HEILBRON
COUNSELORS AT LAW
120 BROADWAY, NEW YORK 5, N.Y.

TELEPHONE DIGBY 9-4141
CABLE ADDRESS "HASTMOR"

April 6, 1965

APR 7 1965

Mr. Marvin Rich
38 Park Row
New York, New York

Dear Mr. Rich:

I have enclosed my penciled notes on the recent bond issues of Alabama, Louisiana and Mississippi, along with the listing of Rand & Co., Inc.

I shall forward the listings weekly from Rand & Co., Inc.

Sincerely,

Elizabeth Barad
Elizabeth Barad

EB:rv
Encls.

April 19, 1965

Collins, Douglas & Elie
2211 Dryades Street
New Orleans, La. 70113

Dear Bob, Nils and Lolis,

Do we want to bring the same bond case in

1. Vermillion Parish
   Abbeville School District #2
   $1,125,000.00
   deadline May 6, 11:00 A.M.

2. East Baton Rouge
   Consolidated School District #1
   $5,000,000.00
   deadline June 1
   (are the schools segregated?)

Your papers are excellent. Consider a minor amendment. In the pertaining clause state "that in the event the district has received the funds from the sale of any of the bonds they shall be restrained from using the same until such plan of desegregation is offered, proposed and accepted."

By the way, as of April 9th over half a million had not been sold in the St. Tammany issue.

Regards,

Carl Rachlin
General Counsel

CR:hdl

7

N. A. A. C. P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
10 Columbus Circle, New York, N. Y. 10019
JUdson 6-8397

JUN 9 1965

June 8, 1965

Mr. Carl Rachlin, General Counsel
Congress of Racial Equality
38 Park Row
New York 38, New York

Dear Carl:

We have received inquiries from the United States Office of Education concerning the settlement of the St. Tammany school case in Louisiana with a court order which falls short of HEW's standards. The effect of agreeing to consent decrees which provide for less desegregation than HEW standards may be to bar the Office of Education from enforcing against school boards a greater rate or extent of desegregation.

For example, in Smith v. St. Tammany Parish School Board, which, I believe, was brought by you and Collins, Douglas and Elie the district court order provides for a rate of desegregation of only two grades for the 1965-66 and 1966-67 school years. Total desegregation will not be accomplished until 1969. But even more seriously, pupil assignment law criteria are applied to granting or denying requests for assignment. The order of Judge Ellis in this case falls far short of the guide lines issued by the Office of Education. However, the fact that a decree has been entered may serve to immunize the school board from a greater rate or extent of desegregation. This is because the Office of Education may accept court decrees as compliance without going behind them in some circumstances. While we do not consider it proper for the Office of Education to accept a decree as weak as the one in St. Tammany Parish case, there is no reason why the Office of Education should be forced to cope with the problems caused by such decrees.

In any school case not yet decided in which a consent decree is offered, a paragraph something like the following

Contributions are deductible for U. S. income tax purposes

should be inserted in the decree (if it is not, you ought not to consent).

> "The plan of desegregation set forth herein shall, in no way, release defendant school board from the obligation of conforming to minimum standards required by the Department of Health, Education and Welfare under Title VI of the Civil Rights Act if such plan of the Department of Health, Education and Welfare requires a greater rate or extent of desegregation."

In cases in which the matter is litigated, not consented to, you should insist that the court order come up to NEW standards at least, or where it can be justified, exceed them. If this is not the case there should be objection to the decree and appeal on that ground.

Sincerely yours,

Michael Meltsner

MM/mgf

cc: Nils Douglas, Esq.
Miss Ruby Martin

St. Tammany

June 10, 1963

Collins, Douglas & Elie
2211 Dryades Street
New Orleans, Louisiana

Dear Bob, Nils, Lolis:

I have just received a letter from Mike Meltsner for reasons that he does not explain. They have received some complaints from the United States Office of Education with regard to the order in the St.Tammany Parish case. As you can see, the complaint is that the order does not meet the minimum standards of HEW. Is it still possible, if this is a fact, to move to reopen the order and ask for one that meets the standards of HEW? Let me hear from you on what you think may be done.

Sincerely,

CARL RACHLIN
General Counsel

CR/ss

cc: Michael Meltsner

July 8, 1965

Collins, Douglas & Elie, Esqs.
2211 Dryades Street
New Orleans, Louisiana

Dear Bob, Nils and Lolis:

I enclose a photocopy of the decision announced the other day by the Fifth Circuit in *Singleton* v. *Jackson Municipal Separate School District, et. al.* A gentleman from the Office of Education talked at length with me about the St. Tammany Parish school case, Herbert Kane, he suggests, in view of Judge Wisdom's statement at the very bottom of Page 2 of the Opinion, we should move for a new order in the St. Tammany Parish case asking for a faster desegregation plan in accordance with the guide lines of the Office of Education. If possible, I would like to do this because I have been talking about getting their cooperation in other school cases and I would like them to think that we are working closely with them.

With kindest regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs
Enc.

Some Investors Say Racial Strife Impairs Sales Appeal of Southern Municipal Bonds

By a WALL STREET JOURNAL *Staff Reporter*

CHICAGO—"Let's face it—these integration riots throughout the South aren't exactly doing the Southern municipal bond market any good."

So says an executive of an investment banking firm in a big Southern city, recently the scene of racial disturbances and desegregation demonstrations by Negroes. While such a reaction might be expected from a Southern businessman who makes his living by underwriting, investing and trading in these tax-exempt securities, racial tension in the South is worrying many investors in the North too.

An official of a big investment banking house based in New York says: "I don't think there's any doubt that racial strife in the South is having some effect on the marketability of Southern municipal bonds, particularly school issues. Just how serious it might get remains to be seen."

Some bond men are concerned that integration may lead to lowered real estate values in some municipalities, thereby hurting those municipalities' ability to retire bonds and meet interest payments.

There have also been isolated cases of picketing of firms that deal in tax-exempt securities of racially segregated communities. In February, members of the Congress of Racial Equality picketed a New York concern that underwrote a Mississippi school bond issue. A CORE spokesman at that time explained such underwriters "supply the money for an action we think is improper and illegal."

Few Recent Southern Offerings

For the most part investment bankers, interviewed as they gathered here for the second municipal conference of the Investment Bankers Association of America, report it's still too early to gauge accurately the impact of the Southern integration crisis on specific municipal bond issues. For one thing, they note, since the racial disturbances hit the headlines recently, there haven't been enough Southern municipal bond issues to provide a valid indication. The most recent issue was a $15 million Virginia Public School Authority issue on which the authority obtaned an annual net interest rate of 2.9346%. A spokesman for one of the competing syndicates said he didn't think Southern racial problems had any effect on the bidding.

Many investment bankers are quick to note, however, the Virginia bonds are issued by an instrumentality of the state and that smaller issues by purely local taxing authorities in the South might find rougher going.

In fact, one official of a firm that bought part of the Virginia school bonds has some reservations about their attractiveness to investors: "It's a good issue, solidly backed, make no mistake about that. But frankly, I don't think investors are going to beat down our doors to snap them up," he says.

Several leading investment bankers say they've already noticed adverse effects of racial troubles on some Southern issues.

"I've got some Mississippi municipals that I'm having difficulty marketing," reports an official of an investment banking firm in a large Northern city. "Of course we could always raise the interest rate to make them more attractive to investors. But just at the moment I'm not sure that even this would work so I guess I'm just stuck with them for a while."

Reluctance to Discuss Situation

Some investment bankers are frankly reluctant even to discuss the matter, much less be quoted by name or to identify particular Southern issues for fear of frightening off potential buyers.

"Investors are a peculiar lot and the seemingly most insignificant things can either cause them to buy or sell quickly or stay out of the market entirely. Any bearish talk by investment house officials is certain to do nothing but aggravate what is already a touchy situation," declares a Philadelphia investment banking executive.

A New York investment banker relates how, just a few days ago, he tried to sell one of his best clients "a few thousand dollars worth of a school issue by a Deep South municipality. His reply was that he didn't feel like 'taking a flyer' right at the moment."

Many individual investors also have expressed worry about worsening race relations in the South could become serious enough to jeopardize bond interest payments.

Effects on Property Values

Thus, a municipal bond department officer for a Chicago bank declares: "Some investors fear that as school integration spreads to more and more formerly all-white districts, whites may move out of the districts. What follows could be a deterioration of property values in those areas. They reason that this would eventually affect the taxes collected on that property which, of course, are used to pay interest and to retire the bonds. Admittedly, that sort of thing wouldn't happen overnight. But remember that purchasers of municipal bonds are often committing themselves to a 20-year investment."

Many investment bankers express concern over President Kennedy's sweeping civil rights legislative proposals. They are particularly worried over the impact of broadening Negro voting rights in Southern districts where they command a majority, or near-majority, of potential eligible voters.

A Pittsburgh municipal bond executive says: "No one can sensibly argue that Negroes shouldn't have the same right to vote as anyone else with no restrictions whatever. But I think we ought to realize that any sudden change in Southern voting patterns where there are heavy concentrations of Negroes may have a big effect on property values. And property values go to the heart of municipal bond issues."

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St. Louis
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D. 293,613 SUN. 339,016

AUG 25 1965

Integrationists Block Bond Sales

Blocking the sale of bonds by segregated school districts is one of the newest and most effective integration devices used by civil rights legal strategists, The Insider's Newsletter reports.

The argument, based on the 1954 Supreme Court desegregation decision is that the sale of such securities may be in violation of the Constitution.

The first action by the Congress of Racial Equality, filed in April for a preliminary injunction stopping the sale of $1.9 million school issue by St. Tammany Parish, La., was initially denied.

Then CORE lawyers learned that if they would withdraw their case, St. Tammany would integrate. The reason, according to The Newsletter, is that no securities are marketable to the public underwriters when there is even a possibility that they may be subject to litigation or when litigation is pending.

CORE FILED A SECOND suit in June against an $[illegible]00,000 Jonesboro, La., offering and in early July was offered a court order integrating Jonesboro schools in exchange for withdrawal of the suit. This time, CORE demanded and got a specific plan for immediate integration of four grades.

In the most recent case, a $6,000,000 Monroe, La., bond issue, agreement may be reached even before it gets into court.

The Newsletter said that CORE may apply the same tactic to public improvement bonds. A street-by-street survey is being made of Jonesboro's Negro districts which have no sewers and inadequate paving.

NEW YORK
Amsterdam News
W. 61,655

AUG 14 1965

Suit Stops Segregated Bond Sale

SHREVEPORT, La. — The ongress of Racial Equality rought suit in Shreveport, La. his week to restrain sale of 6,000,000 worth of school bonds or the city of Monroe, Louisiana n the grounds that the money ill be used to sustain a segre- ated and unconstituional school ystem.

This is the third suit of its kind rought by CORE. The first two, n St. Tammany's Parish and ackson Parish, La., resulted in weeping CORE victories in which arish officials were forced to ubmit desegration plans to the ourt before being allowed to ll their bonds.

The tactic, which has caused rious rumblings on Wall Street, ill be used by CORE, accord- g to General Counsel Carl chlin, "Every time a southern hool district attempts to raise nd money without desegrat- g their schools."

The Monroe case was filed with stice Benjamin C. Dawkins in Federal Court in Shreveport. bonds were scheduled for sale New York on Tuesday, August

HASTINGS ON HUDSON, N. Y.
WESTCHESTER CO. PRESS
W. 6,900 (N)

AUG 1 9 1965

Suit Stops Segregated Bond Sale

SHREVEPORT, La. — The Congress of Racial Equality brought suit in Shreveport, La. this week to restrain sale of $6,000,000 worth of school bonds for the city of Monroe, Louisiana on the grounds that the money will be used to sustain a segregated and unconstitutional school system.

This is the third suit of its kind brought by CORE. The first two, in St. Tammany's Parish and Jackson Parish, La., resulted in sweeping CORE victories in which parish officials were forced to submit desegration plans to the court before being allowed to sell their bonds.

The tactic, which has caused serious rumblings on Wall Street, will be used by CORE.

NEW ORLEANS, LA.
LOUISIANA WEEKLY (N)
W 19,319

AUG 28 1965

Blocking Sale Of School Bonds New Technique

NEW YORK -- Blocking the sale of bonds by segregated school districts is one of the newest and most effective integration devices used by civil rights legal strategists, The Insider's Newsletter reported Monday.

The argument, based on the 1954 Supreme Court desegregation decision, is that the sale of such securities may be in violation of the Constitution.

The first action by the Congress of Racial Equality, filed in April for a preliminary injunction stopping the sale of $1.9 million school bond issue by St. Tammany Parish, La., was initially denied.

Then CORE lawyers learned that if they would withdraw their case, St. Tammany would integrate. The reason, according to The Newsletter, is that no securities are marketable to the public by underwriters when there is even a possibility that they may be subject to litigation or when litigation is pending.

CORE filed a second suit in June against an $800,000 Jonesboro, La. offering and in early July was offered a court order integrating Jonesboro schools in exchange for withdrawal of the suit. This time, CORE demanded and got a specific plan for immediate integration of four grades.

In the most recent case, a $6 million Monroe, La. bond issue, agreement may be reached even before it gets into court.

The Newsletter said that CORE may apply the same tactic to public improvement bonds. A street-by-street survey is being made of Jonesboro's Negro districts which have no sewers and inadequate paving.

THE NATIONAL OBSERVER
WASHINGTON, D. C.
W. 208,878

Carl

AUG 30 1965

Reports From Our Observers

Despite Some Friction, More Schools Integrate

RUBY, S.C.

School desegregation came to this tiny, rural community last week, quietly, peacefully, and completely. No mob gathered, no threats roared as 120 Negroes joined 450 white children in every grade and classroom of the district's lone school.

Nor was Ruby an exception. Throughout the Deep South, in the land that once proclaimed "never," many schools began accepting at least limited integrated enrolment in compliance with court orders and the Civil Rights Act of 1964. In Neshoba County, Mississippi, where three civil-rights workers were slain last year, 10 Negro youngsters registered for classes in previously all-white Neshoba Central High School, and 8 others in Philadelphia city schools. And peaceful desegregation took place also at schools in Arkansas, North Carolina, Georgia, Alabama, and Virginia, with more to follow in the coming two weeks. "The gates are pretty well open," commented one Southern observer.

The Civil Rights Act can be credited for much of this integration, for it requires school districts to set up desegregation plans—and have them approved by the Federal Government—if the districts want to continue receiving Federal school funds. Only about 350 of the 5,135 school districts in the 17 Southern and border states have failed to submit such plans, although 930 of the total have yet to have their plans approved. In Georgia, for instance, all but six school districts have forwarded plans, and only one of the six has said flatly it will not comply.

There are some communities, however, that have decided to forego Federal money in favor of continued segregation. But these still face the possibility of court action under the Supreme Court's 1954 decision outlawing school segregation. The Congress of Racial Equality plans to file suit against two such South Carolina districts, and the Justice Department last week filed suit against a Mississippi school district that had refused to submit desegregation plans.

Obviously resistance to desegregation still exists in the South. South Carolina's Summerton school district, a co-defendant in the 1954 suit that brought the Supreme Court's desegregation ruling, still has not integrated its classrooms. A Federal judge, however, has ordered the school district to enroll nine Negro students this fall, if they seek admittance. And two South Carolina districts that have not filed desegregation plans refused to admit Negroes to all-white schools last week.

There are reports, too, of attempts to intimidate Negroes. The U.S. District Attorney's office in Columbia, S.C., is investigating a complaint that several Negro families in Orangeburg County received letters threatening them if their children attempted to attend white schools.

In Mississippi, at least two dozen private schools will open to white students this fall, and about a dozen others have been issued charters by the Mississippi secretary of state. A similar school is planned in Claredon County, South Carolina. And voters in three Mississippi communities have already approved higher school taxes to make up the Federal funds their districts will lose by not filing desegregation plans.

But for civil-rights forces, there are many hopeful signs. About 90 of Virginia's 130 school districts will be integrated this year. And all of Mississippi's Roman Catholic schools, as well as about 65 per cent of the state's 150 public-school districts, will accept integration this fall.

Admittedly much of this integration is token. In South Carolina about 4,000 Negroes, less than 2 per cent of the state's Negro students, will attend classes with whites this fall. But even this is a gain from the 266 Negroes attending integrated classes in the state last year, and the gains continue.

There appears to be more willingness by Southerners to accept school desegregation. One South Carolina observer attributes this to the new Civil Rights Act. His reasoning: People resented court-ordered desegregation, feeling the judges were making laws as they chose; they accept the Civil Rights Act because the law was passed by Congress.

If this is so, it explains the peaceful, if not enthusiastic, acceptance of school desegregation. And this means a lot. "It's important that things quiet down," says A. R. Meadows, Alabama's superintendent of education.

—JACK BASS

Competitors to Follow Only a Few Price Rises Of Miniature Precision

Position of Bearings Makers Will Probably Cause Cancellation of Some of Concern's 5% Increases

By a WALL STREET JOURNAL *Staff Reporter*

BOSTON—Major bearings makers have decided to follow only a few of the price rises announced last week by Miniature Precision Bearings, Inc. As a result, Miniature Precision said it probably will rescind some of its increases.

Miniature Precision, Keene, N.H., had raised quotes about 5% on all nonstandard miniature and instrument-sized bearings; the move affected goods accounting for about half the company's volume.

However, New Hampshire Ball Bearings, Inc., Peterborough, N.H., "will make no price increases at this time," Arthur N. Daniels, president, said. He added that the price list the concern issued Nov. 23, 1964, "won't be changed over the near term."

"Excess capacity still prevails in the industry," Mr. Daniels continued, "and there is increasing competition from abroad." Despite the competition, which has held representative prices about 25% below the 1952 level, "a favorable trend of sales and earnings is apparent," he said.

Barden Corp., Danbury, Conn., probably will make "a few increases on a scattered and selective basis," Perry R. Roehm, executive vice president, declared. Mr. Roehm said such increases will be confined to a relatively few bearings on which prices haven't been in line with costs, but would affect only a small part of Barden's output.

In light of the New Hampshire Ball Bearings announcement, Miniature Precision "probably will have to adjust prices on individual items where their prices are lower than the ones we announced," William M. Scranton, Miniature Precision's president, said.

"I don't think their move will cause us to pull back our price increases on everything," Mr. Scranton added. "We will have to study our prices on individual items to see where they fit in competitively."

The precision bearings involved are used mainly in defense and space applications, but are finding increased use in civilian products ranging from machine tools to precision tape recording systems.

Gordon Jewelry

GORDON JEWELRY CORP. and subsidiaries report for the six months ended Feb. 28:

	1965	1964	1963
a-Earned per share	$1.25	$.62	$.61
Sales	16,175,681	[illegible]	[illegible]

Segregated-School Bonds Challenged in CORE Suit

By a WALL STREET JOURNAL *Staff Reporter*

NEW ORLEANS—The proposed sale of nearly $2 million in bonds by a segregated school district came under legal attack from the Congress of Racial Equality.

Federal District Judge Frank B. Ellis declined to issue a restraining order sought by CORE to block the St. Tammany Parish School Board from selling $1,995,000 in school bonds today. But the judge set a hearing April 30 for representatives of the parish, or county, school board and the civil rights group to argue the case.

Robert Collins, a CORE attorney, said CORE will request that the school board be required to file a plan to desegregate its schools next September. Mr. Collins noted that, although CORE wasn't successful in blocking the bond sale, the suit "still may have an effect on the marketability of the bonds."

He indicated that CORE plans further court action to try to block such bond sales. "Our basic approach in this suit is that as long as a school board is segregated, any official action it takes is illegal," Mr. Collins said. "This suit is a new line of attack, and we believe it will be a very effective one."

The suit was filed on behalf of Thomas J. Smith, a Negro father of public school children in the district. St. Tammany Parish, north of Lake Pontchartrain, adjoins the Mississippi border.

Aluminium, Ltd., Unit In Jamaica to Expand Production of Alumina

By a WALL STREET JOURNAL *Staff Reporter*

NEW YORK — Aluminium, Ltd., announced its Jamaica subsidiary will expand alumina production by nearly 40,000 tons a year at a cost of nearly $2 million.

Alumina, or aluminum oxide, is produced as an intermediate step in processing bauxite ore into aluminum metal.

The expansion, to begin this year, will raise the alumina production capacity of the Ewarton Works to 350,000 tons a year from 310,000 tons. It will bring Aluminium's total Jamaican alumina production capacity to more than 900,000 tons annually.

The first alumina production facility in Jamaica was the company's Kirkvine Works, near Mandeville, which shipped its first alumina early in 1953. Present Kirkvine capacity is more than 550,000 tons a year.

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KOHLMEYER & CO.

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NEW ISSUE
Rated: Moody's "Baa"
S & P's "BBB"

PRELIMINARY CIRCULAR
Selling: Wednesday,
4/7/65 at 7:30PM,C.S.T.

$1,995,000
ST. TAMMANY PARISH, LOUISIANA
PARISH WIDE SCHOOL DISTRICT NO. 12
_______% School Bonds

DATED: May 1, 1965

DUE: February 1, 1968/81

Coupon bonds of $1,000 or $5,000 denomination. Interest payable February 1, 1966 and semi-annually (February 1 and August 1) thereafter; both principal and interest payable at ____.

CALLABLE: Alternate bids have been solicited for bonds to be callable in inverse order of maturity on any interest date on or after 8/1/75 or 8/1/80 at 100 and accrued interest to date.

THESE BONDS, Voted, are issued for the purpose of acquiring and/or improving lands for building sites and playgrounds, including construction of necessary sidewalks and streets adjacent thereto, purchasing, erecting and/or improving school buildings and other school related facilities, and are payable from UNLIMITED AD VALOREM TAXES ON ALL TAXABLE PROPERTY WITHIN THE PARISH WIDE SCHOOL DISTRICT.

INTEREST EXEMPT FROM ALL PRESENT FEDERAL AND STATE OF LOUISIANA INCOME TAXES

Financial Statement

Estimated Actual Value		$253,873,164
Assessed Valuation (1964)		37,065,482
Direct Debt (Including This Issue)		9,205,000
Approximate Overlapping & Underlying Debt		3,198,500
Ratios:	Direct Debt/Assessed Valuation	24.83%
	Total Debt/Assessed Valuation	33.46%
	Total Debt/Estimated Actual Value	4.89%
Population:	(1965 Estimate) 55,000	

TAX COLLECTIONS:	1963	1962	1961	1960	1959
	100%	100%	99.3%	99.5%	99.7%

LEGALITY: Messrs. Foley & Judell, Attorneys, New Orleans, Louisiana.

ST. TAMMANY PARISH (Co-extensive with School District No. 12) is located on the north shore of Lake Pontchartrain across from the City of New Orleans. The western part of the Parish is connected with the metropolitan area of which it is increasingly a part by the Greater New Orleans Expressway (Pontchartrain Causeway), while the eastern end of the Parish lies adjacent to New Orleans and is connected by Interstate I-10 which will be completed in this area by late 1966. Once primarily a farming and resort area, the Parish has experienced sharp recent growth due to the completion of the Causeway and NASA operations at Michoud, at the Mississippi Test Operation site and at the Computer Center at Slidell. Assessed valuations have increased as follows:

1955 - $18,014,064
1960 - 27,799,857
1964 - 37,065,482

AMOUNT	RATE	MATURITY	PRICE	YIELD	AMOUNT	RATE	MATURITY	PRICE	YIELD
10,000	___%	1968	___	___%	65,000	___%	1982	___	___%
15,000	___%	1969	___	___%	70,000	___%	1983	___	___%
20,000	___%	1970	___	___%	70,000	___%	1984	___	___%
30,000	___%	1971	___	___%	75,000	___%	1985	___	___%
35,000	___%	1972	___	___%	90,000	___%	1986	___	___%
40,000	___%	1973	___	___%	95,000	___%	1987	___	___%
45,000	___%	1974	___	___%	100,000	___%	1988	___	___%
50,000	___%	1975	___	___%	105,000	___%	1989	___	___%
50,000	___%	1976	___	___%	110,000	___%	1990	___	___%
55,000	___%	1977	___	___%	115,000	___%	1991	___	___%
55,000	___%	1978	___	___%	120,000	___%	1992	___	___%
60,000	___%	1979	___	___%	125,000	___%	1993	___	___%
60,000	___%	1980	___	___%	130,000	___%	1994	___	___%
65,000	___%	1981	___	___%	135,000	___%	1995	___	___%

The above information has been obtained from sources which we consider reliable and, while not guaranteed, it has been accepted by us as accurate

March 22, 1965.

ORDERS MAY BE TELEPHONED OR TELEGRAPHED AT OUR EXPENSE

BIRMINGHAM, ALA. 2016 First Ave. N., 323-7121 · CHICAGO, ILL. Board of Trade, HArrison 7-6304 · GREENWOOD, MISS. [illegible] Howard St., GLadstone 3-5671 · HUNTSVILLE, ALA. 106 W. Clinton Ave., 536-4436 · JACKSON, MISS. 1st Natl. Bk. Bldg., 355-6445
LAFAYETTE, LA. Oil Center, CEnter 4-8576 · LAKE CHARLES, LA. 903 Ryan St., 439-9081 · MACON, GA. 1st Natl. Bk. Bldg., 746-3251 · MEMPHIS, TENN. 1st Natl. Bk. Bldg., 525-8591 · NEW YORK, N. Y. 76 Beaver St., WHitehall 4-3900

PUBLISHED IN TWO SECT THIS SECTION **FOR MEN**

THE Insider's Newsletter

AN EVERY MONDAY REPORT FOR BUSY MEN WHO NEED TO KNOW WHAT'S GOING ON

New York, N.Y., August 16, 1965

THE GOP DIVIDES TO CONQUER

The September opening of the GOP Governors' Assn. headquarters in Washington strikes some political experts as the first really significant step in revitalizing the Republican party since the election debacle. The party's conservative image rests largely on the shoulders of Congressmen from rural one-party districts. The governors, with their state and often national outlooks and ambitions, tend to be relatively young reformers. National Chairman Ray Bliss is already making plans to use the association to search out young GOP talent in the governors' own and neighboring states. Despite public disclaimers, Bliss is said to privately support Goldwater's Free Speech Assn.; it will tend to siphon conservative elements away from the party's power center, without losing their votes. Party strategists hope the separation of combatants will quiet ideological disputes and allow candidates like John Lindsay in New York to rebuild party strength on a state and local level for 1966 and 1968.

■■■

AN INTEGRATION BREAKTHROUGH: CORE legal strategists have hit on a devastatingly effective way to speed integration in Southern schools--blocking the sale of bonds by segregated school districts. The argument, based on the 1954 Supreme Court desegregation decision, is that sale of such securities may be in violation of the Constitution. CORE first appealed without success for action by the SEC, IRS and the states of New York, Massachusetts, New Jersey and California. Then someone said, "Let's try it ourselves."

CORE'S FIRST SUIT, filed in Federal court in April for a preliminary injunction stopping the sale of a $1.9 million school bond issue by St. Tammany Parish, La., was initially denied. Then CORE lawyers learned that if they would withdraw their case, St. Tammany would integrate. Reason: No securities are marketable to the public if there is even a possibility that they may be subject to litigation or when litigation is pending. CORE filed a second suit in June, against an $800,000 Jonesboro, La., offering, and in early July was offered a court order integrating Jonesboro schools in exchange for

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withdrawal of the suit. This time, CORE demanded and got a specific plan for immediate integration of four grades. The most recent case involves a $6 million Monroe, La., bond issue; agreement may be reached even before it gets into court. Note: CORE will soon try the same tactic on "public improvement" bonds. A street-by-street survey is being made of Jonesboro's Negro districts, which have no sewers and inadequate paving.

■■■

DE GAULLE'S NAVAL GAMBIT: The French may want to get out of NATO but they don't want the U.S. Sixth Fleet to leave France. Ostensibly as a result of the much-publicized incident at Cannes, when oil from an American carrier accidentally was jettisoned all over the resort's famous beaches, the French are pressuring U.S. officials to transfer the fleet from Cannes to Toulon. Many observers believe this is nothing more than a clever political ploy. The French naval base at Toulon is nearly deserted (most of the French fleet has been transferred to Brest and other Atlantic stations) and Toulon businessmen are blaming the government for this unhappy state of affairs. The American fleet would neatly fill the gap, but Americans oppose the move for morale reasons: It's hard to beat shore leave in Cannes, Nice and Monte Carlo and many men, especially the officers, have brought their families over.

■■■

GARDNER'S TOWER OF BABEL: The first job facing the new Secretary of Health, Education and Welfare, John W. Gardner, is to straighten out, if he can, the internal rivalries threatening to fragment the department. HEW's $7.7 billion budget is now the third largest item in the Federal budget (after defense and interest on the national debt); its disparate divisions, including such venerable bodies as the Public Health Service and the U.S. Office of Education, have so much autonomy that many observers believe no single administrative head can control them all. Also there are bitter intramural disputes over how best to spend the new money pouring into HEW for ill-defined welfare, research and education programs. When Abraham Ribicoff resigned as HEW head in 1962, he urged that the department be broken up, possibly by spinning off the Office of Education. In his press conference last week, President Johnson did not rule out the possibility that the Office of Education still might become a separate agency, even though this is the field of Secretary Gardner's strongest interest. But observers say that once the Department

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The following list is comprised of the more important Municipal issues scheduled for sale on the dates indicated. Time of sale is given in Eastern Daylight Saving Time. The Moody's Rating is that given to outstanding bonds and will not necessarily be the same for the new issues:

INCLUDED ARE NEW ISSUES ON WHICH WE EXPECT TO BID

		MONDAY, MAY 17, 1965			
	11,520,000	YONKERS, NEW YORK, Various	Noon		1966-84
		Bidding with Lehman Bros			
AA	8,200,000	Cook Co, Illinois, Evanston Twp, H.S.D. #202	8:30	pm	1966-84
AA	6,485,000	Cook Co, Illinois, Evanston Comm Cons Sch Dist #65	8:30	pm	1967-84
	1,760,000	Grand Island, Nebraska, Sch Dist	9:30	pm	1973-79
BAA	975,000	Pearsall, Texas, I.S.D.	10:00	pm	....
	950,000	Princeton, Illinois, Hospital	9:00	pm	1966-80
		TUESDAY, MAY 18, 1965			
	1,520,000	CLARK TWP, NEW JERSEY, Sch Dist	8:00	pm	1967-84
		Bidding with Kidder, Peabody & Co			
A	3,000,000	KNOXVILLE, TENNESSEE, Wat Rev	11:00	am	1966-85
		Bidding with White Weld & Co			
AA	60,000,000	VIRGINIA ELECTRIC & POWER CO, 1st Mtge, Ser T	Noon		....
		Bidding with White Weld & Co			
BAA	16,600,000	WEST VIRGINIA STATE OF, Bridge Rev	11:00	am	1977-2005
		Bidding with F. S. Smithers & Co			
A	2,750,000	WICHITA, KANSAS, Various	Noon		....
		Bidding with Morgan Guaranty Trust Co of N.Y.			
	4,000,000	Foothill Jr Coll Dist, California	1:00	pm	1967-90
AA	965,000	Hamden, Connecticut, School	11:30	am	1966-84
	2,250,000	Hutchinson I.S.D. #423, Minnesota	4:00	pm	1966-88
	2,400,000	Lafayette, Louisiana, Utility Rev	Noon		1967-94
BA	1,000,000	Mounds View, Minnesota, I.S.D. #621	10:00	pm	1966-93
	1,640,000	Sinton, Texas, I.S.D.	9:30	pm	1966-80
	1,250,000	Triunfo Co Sant Dist, California, Sew Imp	Noon		1969-94
		WEDNESDAY, MAY 19, 1965			
	14,000,000	INTERSTATE POWER CO, 1st Mtge	Noon		....
		Bidding with Merrill Lynch, Pierce, Fenner & Smith Inc			
A	3,070,000	MIAMI, FLORIDA, Various	Noon		1967-85
		Bidding with Kidder, Peabody & Co			
	79,785,000	NEW YORK STATE HOUSING FINANCE AGENCY, Rev	....		....
		Bidding with Phelps, Fenn & Co			
	125,000,000	PACIFIC TELEPHONE & TELEGRAPH CO, 35 Yr Debentures	....		....
		Bidding with Halsey, Stuart & Co Inc			
A	2,675,000	PAWTUCKET, RHODE ISLAND, Pub Imp	11:00	am	1966-85
		Bidding with White Weld & Co			
AA	960,000	Kane Co, Illinois, Sch Dist #129	5:30	pm	1967-82
A	1,750,000	Pickens Co, South Carolina, Sch Dist	1:00	pm	1966-84
		THURSDAY, MAY 20, 1965			
	4,750,000	COOK CO, ILLINOIS, FOREST PRESERVE DIST, Corp Ser Q	11:00	am	....
		Bidding with Harriman Ripley & Co., Inc			
	3,975,000	MANLIUS, POMPEY, etc, NEW YORK, C.S.D. #1	2:00	pm	1966-91
		Bidding with Marine Trust of Western New York			
AA	1,500,000	Danville, Illinois, Sant Dist	1:00	pm	1968-83
A	1,500,000	Florida Development Comm, Baker Co Rd Rev	3:30	pm	1967-92
AA	1,500,000	Genesee Co, Michigan, Sew Disposal Dist #3	8:00	pm	1967-2003
	1,050,000	Lebanon, Kentucky, Industrial Bldg Rev	Noon		....
	4,750,000	Louisiana Polytechnical Institute, Dining Hall Rev	12:30	pm	....
		MONDAY, MAY 24, 1965			
	3,790,000	Louisiana State University & Agricultural & Mechanical Coll	Noon		1967-2004
	2,600,000	Ovid, Elsie Area Schools, Michigan, Sch	9:00	pm	1967-94
		TUESDAY, MAY 25, 1965			
A	5,500,000	AMARILLO, TEXAS, Park	3:30	pm	1965-89
		Bidding with Eastman Dillon, Union Securities & Co			
	6,000,000	CADDO PARISH, LOUISIANA, Sch Dist	Noon		1966-85
		Bidding with Morgan Guaranty Trust Co of N.Y.			
	4,000,000	JORDAN, UTAH, School Dist	10:00	pm	1967-76
		Bidding with Kidder, Peabody & Co			

While the accuracy of the information contained herein is not guaranteed by us, it has been taken from sources which we believe to be

TUESDAY, MAY 25, 1965

	6,000,000	METROPOLITAN, EDISON CO, Debentures Bidding with White Weld & Co	11:00	am	....
	3,000,000	NIAGARA FALLS, NEW YORK, Imp Bidding with Glore, Forgan & Co	11:00	am	1966-75
	15,000,000	PENNSYLVANIA STATE HIGHWAY & BRIDGE AUTH, Rev Bidding with Drexel & Co	1:00	pm	1966-85
A	10,000,000	PORT OF SEATTLE COMM, WASHINGTON, Wat Front Fac &Imp Bidding with White Weld & Co	2:00	pm	1967-75
	25,000,000	TENNESSEE STATE OF, Various Bidding with First National Bank of Memphis	Noon		1966-95
	1,200,000	Bessemer, Alabama, Cap Imp	Noon		1966-89
	~~6,000,000~~	~~Beverly Hills, California, U.S.D.~~	~~Noon~~		~~1966-85~~
AA	1,000,000	Boise Jr College Dist, Idaho	....		....
	2,400,000	Fairfield, Suisun Sew Dist, California, Sew	11:00	pm	1967-98
	1,700,000	Smith Co, Texas, Hospital Center	Noon		1966-85
BAA	4,200,000	South Co Jt Jr Coll Dist, California	1:00	pm	1966-90
	4,000,000	Washoe Co, Sch Dist, Nevada, School	11:00	pm	1966-75
	5,780,000	Winono Special Sch Dist #5, Minnesota	4:00	pm	1968-90

WEDNESDAY, MAY 26, 1965

	15,000,000	LOS ANGELES, CALIFORNIA, Dept of Wat & Pwr Bidding with Glore, Forgan & Co	11:00	am	1966-95
	1,995,000	MARCELLUS, SKANEATELES, etc, NEW YORK, C.S.D.#1 Bidding with Kidder, Peabody & Co	2:00	pm	1966-94
AAA	133,280,000	PUBLIC HOUSING ADMINISTRATION, New Housing Bidding with First National City Bank	Noon		....
	9,000,000	UNIVERSITY OF WYOMING, TRUSTEES OF, Dorm & Dining Rev Bidding with Blyth & Co	1:00	pm	1969-2008
	980,000	Elgin Twp, Illinois, Library	....		....
BAA	2,285,000	Robinsdale, I.S.D. #281, Minnesota	5:00	pm	....

THURSDAY, MAY 27, 1965

AA	1,110,000	ROCKVILLE, MARYLAND, Imp Bidding with Robert Garrett & Sons	8:30	pm	1966-85
	1,600,000	Libertyville, Illinois, Wat Wks & Sew Rev	4:00	pm	1966-90
	2,400,000	Opa-Locka, Florida, City Imp	8:30	pm	1968-85

TUESDAY, JUNE 1, 1965

A	5,000,000	EAST BATON ROUGE PARISH, LOUISIANA, C.S.D. #1 Bidding with F. S. Shields & Co	....		....
	11,000,000	UNIVERSITY OF UTAH, Student Fee Rev Bidding with Kidder, Peabody & Co	7:00	pm	....
	4,000,000	Greater Cincinnati Airport, Ohio, Airport Rev	....		....
	4,000,000	Kento Co, Kentucky Airport Bd, Airport Rev	....		....
	3,200,000	North Smithfield, Rhode Island	11:00	am	1966-85
	800,000	Opelousas, Louisiana, Pub Imp	....		1968-90

WEDNESDAY, JUNE 2, 1965

AA	825,000	Beloit, Wisconsin, Corp Purp	1:00	pm	1966-85
	1,000,000	Clintonville, Emboross, etc, Wisconsin, S.D. #1	3:00	pm	....

THURSDAY, JUNE 3, 1965

A	10,000,000	LOUISIANA STATE BOND & BLDG COMM, Pub Bldg Rev Bidding with Merrill Lynch, Pierce, Fenner & Smith, Inc	1:00	pm	1966-90
	3,010,000	Orleans Levee Dist, Louisiana, Var Imp	4:30	pm	1966-85

MONDAY, JUNE 7, 1965

	2,000,000	Garland, Texas, I.S.D.	9:30	pm	1966-97
	1,000,000	Palm Springs, California, U.S.D.	2:00	pm	1967-86

TUESDAY, JUNE 8, 1965

	18,000,000	LOUISVILLE, KENTUCKY, Wat Rev Bidding with Lehman Bros	....		1966-2000
	67,000,000	UTAH STATE, Coll Const & Parks Bidding with Morgan Guaranty & Trust Co of N.Y.	....		....

WEDNESDAY, JUNE 9, 1965

	1,103,000	Hamilton Co, Ohio, Sant Sew	1:00	pm	1966-85
	1,143,000	Hortonvill, Center Bale, etc, Wisconsin, C.S.D. #1	2:00	pm	....

THURSDAY, JUNE 10, 1965

	10,645,000	DENVER, COLORADO, Various Bidding with Morganty Guaranty Trust Co of N.Y.	1:00	pm	1966-75

WEDNESDAY, JUNE 16, 1965

	30,000,000	LOS ANGELES, CALIFORNIA, Airport Rev Bidding with F. S. Smithers & Co	....		....

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MUNICIPAL MARKET SUMMARY FOR WEEK ENDING MAY 14, 1965

Last week's municipal market pattern was essentially repeated this week, i.e., the large new offerings were well received by investors and many of the older issues were subjected to sales at reduced prices. The $100 million California Sch Bonds brought to market this week had a balance of $17.5 million by week end. Other large issues which sold this week, such as the $10 million Cleveland, C.S.D., $16,863 million Delaware and $15,000,000 Alabama Highway Revenue issues, had week end balances of $4.5 million, $3.25 million and $3.6 million respectively. This past week's smaller issues ($10 million or less) were less enthusiastically received by investors with most showing at best a one-half selling effort.

Municipal dollar bonds were again generally quiet and unchanged.

According to the Daily Bond Buyer, issues scheduled for sale this week aggregate $108,655,000 and $261,054,000 short term notes.

Results of Major Bond issues sold during the week were as follows:

ISSUE	AMOUNT	UNSOLD 5/14/65	HIGH BID	SECOND BID
MONDAY				
Akron, Ohio, Wat Wks, Imp	5,000 M	2,945 M	3.10%	3.14%
Cherry Hill Twp, New Jersey, Sew	1,293 M	722 M	100.135 for 3 3/8%	100.110 for 3 3/8%
Clackamas Co, Oregon, Sch Dist #7	1,470 M	355 M	3.29%	3.31%
Las Virgenes Municipal Wat Dist, California	1,250 M	*	4.18%	4.30%
Parma, Ohio, City Sch Dist	1,000 M	300 M	3.33%	3.35%
Redding, California, Sch	1,307 M	772 M	3.19%	3.22%
Westminster, Colorado, Wat	3,010 M	765 M	3.47%	3.48%
TUESDAY				
Alabama St H'way Auth, Ser M, Rev	15,000 M	3,680 M	3.371%	3.376%
~~Antioch, California, U.S.D., Sch Dist~~	~~2,000 M~~	~~935 M~~	~~3.130%~~	~~3.137%~~
California St Sch Bldg, Ser HH & JJ	100,000 M	17,860 M	3.22%	3.23%
Cleveland, Ohio, City Sch Dist	10,000 M	4,470 M	3.037%	3.038%
Clovis, New Mexico, Sch Dist #1	1,600 M	1,280 M	2.87%	2.88%
Delaware State of, Cap Imp	16,863 M	4,085 M	3.002%	3.008%
Delta Twp, Michigan, G.O.	1,590 M	675 M	3.67%	3.70%
Denver, Colorado, Ref Wat	1,170 M	**	2.39%	2.43%
Enumclaw, Washington, Wat & Sew	1,000 M	500 M	3.64%	3.65%
Kane Co, Illinois, Sch Dist #101	1,270 M	935 M	3.02%	3.05%
New Haven Urban Renewal Agency, Connecticut	1,240 M	1,200 M	3.19%	100.962 for 3 1/4%
North Suburban Sant Sew Dist, Minnesota, Sew	2,500 M	1,370 M	3.88%	3.91%
Oldham Co, Kentucky, Sch Rev	1,850 M	1,500 M	3.63%	3.65%
~~St. Bernard, Parish, Louisiana~~	~~2,500 M~~	~~*~~	~~3.6440%~~	~~3.6442%~~
St. Joseph, Missouri, Sch Dist	3,500 M	1,745 M	3.12%	3.14%
San Antonio, Texas, I.S.D.	6,000 M	3,105%	3.05%	3.06%
Tucson, Arizona, Wat Rev	5,000 M	3,630 M	3.33%	3.34%
Tucson, Arizona, Sew, G.O.	2,000 M	1,460 M	3.11%	3.12%
White Bear Lake, Minnesota, I.S.D. #624, Ref	3,255 M	1,875 M	3.42%	3.44%
WEDNESDAY				
Charleston Co, South Carolina, Pub Bldg	4,350 M	2,480 M	2.99%	3.00%
Oneonta, New York, City Sch Dist	2,000 M	1,555 M	100.286 for 3.30%	100.192 for 3.30%
Rush, Henrietta, New York, C.S.D. #1	1,650 M	1,450 M	100.326 for 3 1/4%	100.149 for 3 1/4%
Sacramento City Sch Dist, California, Sch Ser	12,840 M	4,195 M	3.070%	3.072%
St. Louis Co, Missouri, Parkway Sch Dist	1,500 M	660 M	3.196%	3.198%
THURSDAY				
Jefferson Parish, Louisiana, Hospital Dist #1	~~2,000 M~~	~~*~~	~~4.02%~~	~~*~~
~~Olmstead Falls~~, Ohio, Sch Dist	1,100 M	445 M	3.24%	3.25%
Wayne Co, Michigan, Metro Airport Rev	1,725 M	780 M	3.552%	3.58%
Wayne Co, Michigan, Wat Supply System	1,000 M	300 M	3.59%	3.66%
TOTAL	210,526 M	82,409 M		

* Not Available
** Not Re-offered

Average prices of Original Offering Scales for the Week Ending May 14, 1965 are as follows: (These averages do not include revenue bonds)

MOODY'S RATING	NO OF ISSUES	1970	1975	1980	1985	1995	2005
AAA	1	2.60	2.80	2.90	3.00	3.20	-
AA	4	2.70	2.88	3.02	3.12	-	-
A	11	2.76	2.95	3.09	3.23	3.40	-
BAA	7	2.90	3.13	3.28	3.38	-	-

While the accuracy of the information contained herein is not guaranteed by us, it has been taken from sources which we believe to be reliable.

MUNICIPAL & REVENUE BONDS STATISTICS

MAY17, 1965

COMPILED BY THE DAILY BOND BUYER

STATUS OF MAJOR BOND ACCOUNTS

	Open Bond Accounts	Aggregate of Unsold Bonds	Past Week's New Issues	VISIBLE SUPPLY NEXT 30 DAYS	BOND BUYER AVERAGE	AVAILABLE SUPPLY BLUE LIST	DOW JONES AVERAGE
This Week	217	307, 617, 000	230, 890, 000	563, 194, 441	3. 14	817, 866, 800	3. 24
Last Week	202	298, 853, 000	119, 193, 000	678, 729, 506	3. 15	814, 038, 000	3. 24
Month Ago	204	284, 851, 000	242, 850, 000	508, 271, 100	3. 15	741, 946, 000	3. 23
1965							
High	217	381, 306, 000	337, 763, 000	875, 861, 690	3. 04	817, 866, 800	3. 10
Low	151	165, 195, 000	27, 394, 000	447, 267, 906	3. 20	575, 176, 134	3. 27

MOODY'S
RATING

NR 11,790,000 PENNSYLVANIA STATE SCH BLDG AUTH, SCH LEASE REV SER R, DTD 5/1/65-DUE NOV 1

165M	4%	1966	2.45	775M	3.15%	1980	100
510M	4%	1967	2.55	1,055M	3.15%	1981	100
635M	4%	1968	2.65	815M	3.20%	1982	100
630M	4%	1969	2.75	510M	3.20%	1983	100
685M	4%	1970	2.80	155M	3 1/4%	1985	100
725M	4%	1971	2.85	150M	3 1/4%	1986	100
765M	4%	1972	2.90	95M	3.30%	1987	100
760M	4%	1973	2.95	185M	3.30%	1988	100
815M	3.80%	1974	3.00	30M	3.35%	1989	100
565M	3.70%	1975	3.05	200M	3.35%	1990	100
505M	3.10%	1978	100	165M	3 3/8%	1992	100
935M	3 1/8%	1979	100				

BAA 1,850,000 ✓ PICAYUNE, MISSISSIPPI, WAT WKS, SEW & NATURAL GAS REV, DTD MARCH 1, DUE APRIL 1

75M	4%	1974	3.05	135M	3 1/2%	1982	3.45
30M	4%	1975	3.10	15M	3 1/2%	1983	3.50
85M	3 1/2%	1976	3.15	140M	3 1/2%	1984	3.50
90M	3 1/2%	1977	3.20	155M	3.60%	1985	3.55
120M	3 1/2%	1978	3.25	160M	3.60%	1986	3.55
120M	3 1/2%	1979	3.30	140M	3.60%	1987	3.60
125M	3 1/2%	1980	3.35	175M	3.60%	1988	3.60
130M	3 1/2%	1981	3.40	155M	3.60%	1989	3.60

A 2,285,000 UNION FREE SCH DIST #2, TOWN OF SOUTHAMPTON, SUFFOLK CO, N.Y. FEB 1

80M	3.30%	1967	2.50	100M	3.30%	1981	3.10
55M	3.30%	1968	2.60	100M	3.30%	1982	3.15
90M	3.30%	1969	2.70	100M	3.30%	1983	3.15
40M	3.30%	1970	2.80	100M	3.30%	1984	3.20
90M	3.30%	1971	2.85	100M	3.30%	1985	3.20
90M	3.30%	1972	2.90	110M	3.30%	1986	3.25
90M	3.30%	1973	2.95	110M	3.30%	1987	3.25
90M	3.30%	1974	2.95	70M	3.30%	1989	3.30
40M	3.30%	1976	3.00	110M	3.30%	1990	3.30
90M	3.30%	1977	3.00	65M	3.30%	1991	3.35
100M	3.30%	1978	3.05	110M	3.30%	1992	3.35
100M	3.30%	1979	3.05	110M	3.30%	1993	3.35
75M	3.30%	1980	3.10	110M	3.30%	1994	3.35

6,740,000 WASHINGTON SUBURBAN SANT DIST, MARYLAND, W.I., MAY 1

535M	5%	1968	2.60	705M	3%	1979	3.05
535M	5%	1969	2.70	430M	3.10%	1980	100
505M	4 1/4%	1970	2.80	745M	3.10%	1981	100
20M	3%	1972	2.90	535M	3.10%	1982	3.15
380M	3%	1973	2.90	785M	3.10%	1983	3.15
370M	3%	1977	3.00	10M	3.20%	1984	100
460M	3%	1978	3.05	720M	3.20%	1985	100
				30M	3.20%	1986	100

NR 2,233,000 WESTERN ILLINOIS UNIVERSITY, STUDENT HOUSING REV, OCT 1

85M	5%	1970	2.95	155M	3.80%	1985	3.55
85M	5%	1971	3.00	10M	3.80%	1986	3.60
95M	5%	1972	3.05	65M	3.80%	1987	3.60
95M	5%	1973	3.10	170M	3.80%	1988	3.60
45M	5%	1974	3.15	45M	3 3/4%	1992	3.70
85M	5%	1975	3.20	215M	3 3/4%	1994	3.70
10M	5%	1976	3.25	220M	3 3/4%	1995	3.70
15M	5%	1977	3.30	230M	3 3/4%	1996	3.70
15M	4 1/4%	1978	3.35				
20M	4 1/4%	1979	3.40				
25M	4%	1980	3.45				
130M	4%	1981	3.45				
135M	3.90%	1982	3.50				
140M	3.90%	1983	3.50				
145M	3.80%	1984	3.55				

ORIGINAL OFFERING SCALES

	HAMBURG, MUNICIPAL AUTH OF BERKS CO, PENNSYLVANIA, Sew Rev	CENTRAL TIOGA CO SCH AUTH, PENNSYLVANIA, School Revenue	MOBILE CO, ALABAMA, BD OF SCH COMM, Cap Outlay Warrents	CHAMPAIGN CO ILLINOIS Comm Unit Sch Dist #4	THIENSVILLE & MEQUON, WISCONSIN, S.D. #3	BOWLING GREEN UNIVERSITY OHIO	WAYNE TWP, NEW JERSEY School District	ISLIP & BROOKHAVEN, NEW YORK, U.F.S.D. #5	OSWEGO, NEW YORK Gen Imp	FLORHAM PARK, NEW JERSEY Sew Auth, Sewer Revenue	MESQUITE, TEXAS I.S.D.
Amount (M)	2,025	1,230	4,000	2,320	900	5,500	2,934	1,600	1,050	3,765	2,615
Coupon Rate	(1)	(1)	(2)	(3)	(4)	(5)	3.45%	3.40%	2.90%	(6)	(7)
Month Maturity	Jun 1	Jul 1	Feb 1	Nov 1	Nov 1	Apr 1	May 1	Jun 1	Jun 1	Dec 1	Jun 1
Date of Sale	4/13	4/26	4/28	4/28	4/28	4/29	4/29	4/29	4/29	5/3	5/3
Moody's Rating	....	....	A	AA	A	BAA	BAA	BAA	AA	BAA	BAA
Callable Feature	(a)	(b)	(c)	....	....	....	....	....	....	(d)	(e)
1965			–						**		
1966	2.50	2.60	2.40	2.35	2.40			2.40	2.35		
1967	2.70	2.70	2.60	2.45	2.50	2.60	2.65	2.60	2.45		2.60
1968	2.80	2.80	2.70	2.55	2.60	2.75	2.75	2.70	2.55	2.70	2.70
1969	2.90	2.90	2.80	2.65	2.70	2.85	2.85	2.80	2.65	2.80	2.80
1970	2.95	3.00	2.85	2.70	2.75	2.95	2.95	2.90	2.70	2.85	2.90
1971	3.00	3.00	2.90	2.75	2.80	3.00	3.00	2.95	2.75	2.90	3.00
1972	3.05	3.05	2.95	2.75	2.85	3.05	3.00	3.00	2.80	2.95	3.00
1973	3.10	3.10	3.00	2.80	2.85	3.10	3.05	3.00	2.80	3.00	3.05
1974	3.15	3.15	3.05	2.85	2.90	3.15	3.10	3.05	2.85	3.05	3.10
1975	3.20	3.20	3.10	2.85	2.90	3.20	3.15	3.10	2.85	3.10	3.15
1976	3.25	3.25	3.10		2.95	3.25	3.20	3.10	2.90	3.15	3.15
1977	3.30	3.30	3.15		3.00	3.30	3.20	3.15	2.90	3.20	3.20
1978	3.35	3.35	3.20		3.00	3.35	3.25	3.15	2.95	3.20	3.25
1979	3.40	3.35	3.25		3.05	3.40	3.25	3.20		3.25	3.25
1980	3.40	3.40	3.30		3.10	3.45	3.30	3.25		3.25	3.30
1981	3.45	3.40	3.35		3.15	3.45	3.30	3.25		3.30	3.30
1982	3.45	3.45	3.40		3.20	3.50	3.35	3.30		3.30	3.35
1983	3.50	3.45	3.40		3.20	3.50	3.35	3.30		3.35	3.40
1984	3.50	3.50	3.45		3.25	3.55	3.35	3.35		3.35	3.45
1985	3.50	3.50	3.50		3.25	3.55	3.40	3.35		3.40	3.45
1986						3.60	3.40	3.35		3.40	3.50
1987						3.60	3.40	3.40		3.45	3.50
1988						3.65	3.45	3.40		3.45	3.50
1989						3.65	3.45	3.40		3.50	3.55
1990						3.65	3.45	3.40		3.50	3.55
1991						3.70	3.50	3.45		3.50	3.60
1992						3.70	3.50	3.45		3.55	3.60
1993						3.70	3.50	3.50		3.55	3.60
1994						3.70	3.50	3.50		3.60	3.60
1995	3.625	3.60				3.75				3.60	99 1/2
1996						3.75				3.60	99 1/2
1997						3.75				3.65	99 1/2
1998						3.75				3.65	99
1999						3.75				3.65	99
2000						3.75				3.70	
2001						3.75				3.70	
2002						**				3.70	
2003						**				3.70	
2004						**				**	
2005	3.75										

(a)	1971-2005
callable	1970
(b)	1970-95
callable	1969
(c)	1972-85
callable inversely	1970
(d)	1976-2004
callable inversely	1975
(e)	1985-99
callable	1984

(1)
Coupons As Shown All Bonds Re-offered At Par

(2)	
5%	1966-71
3 1/4%	1972-79
3.30%	1980-81
3.40%	1982-84
3 1/2%	1985
(3)	
4%	1966-67
2 3/4%	1968-73
2 7/8%	1974-75
(4)	
3 1/2%	1966-71
3%	1972-78
3.10%	1979-81
3 1/4%	1982-85
(5)	
4 3/4%	1967-77
4%	1978-82
3 7/8%	1983
3.70%	1984-94
3 3/4%	1995-2001
3%	2002-2004
(6)	
5%	1967-75
4.60%	1976
3.60%	1977-96
3.70%	1997-2003
2 1/2%	2004
(7)	
5%	1967-75
3.40%	1976-83
3 1/2%	1984-90
3.60%	1991-99

** Not Re-offered
April May 3, 1965

May 3, 1965 - Dow Jones Municipal Average 3.24

While the accuracy of the information contained herein is not guaranteed by us, it has been taken from sources which we believe to be reliable.

NORTH CAROLINA

ORIGINAL OFFERING SCALES

	STILLWATER, OKLAHOMA Water System	FRIDLEY, MINNESOTA Ser C, Water Works	FRIDLEY, MINNESOTA Ser A, Special Asst	FRIDLEY, MINNESOTA Ser B, Civic Center	RIDGEWOOD, NEW JERSEY School Dist	LUFKIN, TEXAS Various	STATESBORO, GEORGIA Water & Sewer Rev	TUSCUMBIA, ALABAMA Ref Sch Warrents	DAVIS CO, UTAH Sch Dist	LEOMINSTER, MASSACHUSETTS School	GLEN COVE, NEW YORK City Sch Dist
Amount (M)	1,350	780	715	500	2,900	2,500	1,500	1,400	1,095	1,000	1,000
Coupon Rate	(1)	(2)	(2)	(2)	3%	(3)	(4)	(5)	(6)	3.10%	3.30%
Month Maturity	Jul 1	Jul 1	Jul 1	Jul 1	May 1	May 1	Feb 1	Feb 1	Jun 1	May15	Jun 1
Date of Sale	4/30	5/3	5/3	5/3	5/4	5/4	5/4	5/4	5/4	5/4	5/4
Moody's Rating	A	BAA	BAA	BAA	AA	BAA	BAA	BAA	AA	AA	A
Callable Feature	....	....	....	....	...	(a)	(b)	(c)	....	....	....
1965											
1966			2.50				2.60	2.50		2.30	2.40
1967	2.60		2.60		2.40		2.75	2.75		2.45	2.55
1968	2.65	2.70	2.70	2.70	2.50		2.80	2.90		2.55	2.65
1969	2.70	2.80	2.80	2.80	2.60		2.85	3.00		2.65	2.75
1970	2.75	2.90	2.90	2.90	2.65	2.90	2.90	3.00		2.70	2.85
1971	2.80	3.00	3.00	3.00	2.70	3.00	2.95	3.00		2.75	2.90
1972	2.80	3.05	3.05	3.05	2.75	3.00	3.00	3.05		2.80	2.90
1973	2.85	3.10	3.10	3.10	2.75	3.05	3.00	3.10	2.80	2.85	2.95
1974	2.85	3.15	3.15	3.15	2.80	3.10	3.05	3.15	2.85	2.85	2.95
1975	2.90	3.20	3.20	3.20	2.80	3.15	3.10	3.20		2.90	3.00
1976	2.90	3.25	3.25	3.25	2.85	3.20	3.15	3.25		2.90	3.00
1977	2.90	3.25	3.25	3.25	2.85	3.20	3.20	3.30		2.95	3.05
1978	2.95	3.30	3.30	3.30	2.90	3.20	3.20	3.35		2.95	3.05
1979	2.95	3.35	3.35	3.35	2.90	3.25	3.25	3.40		3.00	3.10
1980	3.00	3.40	3.40	3.40	2.95	3.25	3.25	3.45		3.00	3.10
1981		3.40	3.40	3.40	2.95	3.30	3.30	3.50		3.00	3.15
1982		3.45	3.45	3.45	3.00	3.35	3.30	3.50		3.05	3.15
1983		3.50	3.50	3.50	3.00	3.35	3.35	3.55		3.05	3.20
1984		3.50	3.50	3.50	3.05	3.40	3.35	3.60		3.05	3.20
1985		3.55	3.55	3.55	3.05	3.40	3.40	3.65			3.25
1986		3.55	3.55			3.45	3.40	3.70			3.25
1987		3.60				3.50	3.40	3.75			3.30
1988		3.60				3.55	3.45	3.75			3.30
1989						3.55	3.45	3.80			3.30
1990						3.55	3.45	3.80			3.35
1991							3.50	3.85			3.35
1992							3.50	3.85			3.40
1993							3.50	3.85			3.40
1994								3.85			3.40
1995								**			
1996											
1997											
1998											
1999											
2000											
2001											
2002											
2003											
2004											
2005											

(a)	1981-90
callable	1980
(b)	1974-93
callable inversely	1973
(c)	1976-95
callable inversely	1975

(1)	
4%	1967-68
2 3/4%	1969-70
2.80%	1971-72
2.85%	1973-74
2.90%	1975
2.95%	1976-80
(2)	
3.20%	1966-75
3.30%	1976-78
3.40%	1979-81
3 1/2%	1982-88
(3)	
4 1/2%	1970-76
4 1/4%	1977
3.40%	1978-86
3 1/2%	1987-90
(4)	
4%	1966-75
3.40%	1976-93
(5)	
5%	1966-77
4%	1978-94
5/8%	1995
(6)	
3%	1973
2 7/8%	1974

** Not Re-offered May 4, 1965

May 3, 1965 - Dow Jones Municipal Average 3.24

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SH, LOUISIANA
Sch Dist #2

RAND & CO., INC.

ONE WALL STREET NEW YORK 10005, N. Y.

Telephone WHitehall 4-3430

Teletype NY 1-838
212-571-0178

MUNICIPAL MARKET SUMMARY

FOR WEEK ENDING MAY 8, 1965

Although this week's new issue volume was substantially reduced from that of last week, syndicate men remained cautious in their bidding. Even with this approach, most new issues were only half sold. Of the new loans that came to market the $23 million Penn School Building Authority issue was about 40% absorbed by investors. The account at week end had a $13 million balance. Although showing a $4,600,000 balance out of $15,000,000. The term bonds of the Metropolitan Seattle loan were divided among the members and a true balance cannot be determined. Older accounts continued to sell bonds at list or near list prices. Dollar bonds were generally unchanged on quiet trading.

According to the Daily Bond Buyer, issues scheduled for sale this week aggregate $244,243,000 and $192,307,000 short term notes.

Results of Major Bond issues sold during the week were as follows:

ISSUE	AMOUNT	UNSOLD 5/8/65	HIGH BID	SECOND BID
MONDAY				
Atlanta, Georgia, Wat Wks Rev	2,000 M	1,425 M	3.102%	3.109%
Bridgewater Twp, New Jersey, Sew	1,200 M	615 M	$569,740	$578.701
Florham Park, Sew Auth, New Jersey, Sew Rev	3,765 M	2,235 M	3.59%	3.64%
Grosse Pointe, Michigan, Sew Sys	1,325 M	615 M	2.99%	3.00%
Huron, Michigan, School	1,600 M	360 M	3.43%	3.44%
Jurupa, U.S.D., Sch Ser B, California	1,145 M	470 M	3.69%	3.77%
Mesquite, Texas, I.S.D.	2,615 M	805 M	3.612%	3.617%
TUESDAY				
Brookhaven, Smithtown, etc, N.Y. C.S.D.#5	2,482 M	1,570 M	100.989 for 3 1/2%	100.953 for 3 1/2%
Brookhaven, New York, U.F.S.D. #2	2,320 M	2,000 M	100.009 for 3.30%	100.919 for 3.40%
Coconino Co, Arizona, S.D. #1	1,160 M	**	2.996%	3.07%
Coconino Co, Arizona, Flagstalf, H.S.D.	2,640 M	1,965 M	2.991%	3.07%
Davis Co, Utah, Sch Dist, Sch	1,005 M	400 M	2.915%	2.917%
Duluth Special Sch Dist #3, Minnesota	1,600 M	765 M	3.05%	3.06%
Gastonia, North Carolina, Elec Light	1,500 M	NONE	3.10%	3.12%
Glen Cove, New York, C.S.D.	1,000 M	820 M	100.190 for 3.30%	101.23 for 3.40%
Leonminister, Massachusetts, Sch	1,660 M	320 M	100.71 for 3.10%	100.60 for 3.10%
Lufkin, Texas, Various	1,705 M	1,020 M	3.49%	3.53%
San Jose U.S.D., California, Sch Ser B	4,250 M	3,200 M	3.083%	3.085%
Statesboro, Georgia, Wat & Sew Rev	1,500 M	750 M	3.44%	3.49%
Tuscambia, Alabama, Refunding Sch Warrents	1,400 M	675 M	3.74%	3.78%
WEDNESDAY				
Cincinnati, Ohio, Var Purp	8,545 M	5,040 M	3.12%	3.15%
Louisville & Jefferson Co, Metro Sew, Kentucky	5,000 M	1,795 M	3.36%	3.37%
Pennsylvania St Pub Sch Bldg Auth	23,075 M	13,725 M	3.23%	3.24%
Ridgewood Twp, New Jersey, Sch Dist	2,900 M	2,641 M	100.162 for 3%	100.296 for 3.05%
Willmar, Minnesota, Utility Rev	1,530 M	710 M	3.26%	3.28%
THURSDAY				
Brecksville City Sch Dist, Ohio	1,140 M	**	3.25%	3.28%
Fort Collins, Colorado, Water	3,200 M	*	3.07%	*
Fort Collins, Colorado, Sew Sys Rev	2,492 M	*	3.18%	*
Kenton Co, Kentucky, Bldg Rev	2,100 M	**	4.11%	*
Kirkwood, Missouri, Pub Imp	1,997 M	*	3.06%	3.07%
Metro Seattle Washington, Sew Rev	15,000 M	4,560 M	3.59%	3.60%
Ottawa Co, Michigan, Wat Supply Sys	1,810 M	*	3.26%	3.32%
Skaneateles, Spafford, etc, N.Y. C.S.D. #1	2,895 M	1,580 M	100.095 for 3.30%	100.954 for 3.40%
Troy, New York, Various	1,760 M	1,565 M	100.318 for 3.40%	100.27 for 3.40%
Vermilion Parish, Louisiana, Sch Dist #2	1,125 M	*	3.63%	3.64%
Webber Co, Utah, Library	1,500 M	555 M	3.018%	3.019%
TOTAL	114,881 M	51,471 M		

* Not Available
** Not Re-offered

Average prices of Original Offering Scales for the Week Ending May 8, 1965 are as follows: (These averages do not include revenue bonds)

MOODY'S RATING	NO OF ISSUES	1970	1975	1980	1985	1995	2005
AAA	0	-	-	-	-	-	-
AA	7	2.70	2.88	2.98	3.08	-	-
A	7	2.81	2.97	3.09	3.23	-	-
BAA	8	2.89	3.11	3.27	3.39	3.50	-

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The following list is comprised of the more important Municipal issues scheduled for sale on the dates indicated. Time of sale is given in Eastern Daylight Saving Time. The Moody's Rating is that given to outstanding bonds and will not necessarily be the same for the new issues:

INCLUDED ARE NEW ISSUES ON WHICH WE EXPECT TO BID

MONDAY, MAY 10, 1965

A	5,000,000	AKRON, OHIO, Wat Wks Imp Bidding with Eastman Dillon Union Securities & Co	1:00	pm	1966-85
BAA	1,583,000	CHERRY HILL, NEW JERSEY, Sew & Bldg Bidding with Halsey, Stuart & Co Inc	8:00	pm	1966-88
BAA	1,470,000	Clackamas Co, Oregon, Sch Dist #7	10:30	pm	1966-85
	1,350,000	Las Vrigenes Municipal Wat Dist, California	11:00	pm	....
BAA	1,000,000	Parma, Ohio, City Sch Dist	1:00	pm	1966-85
	1,307,000	Redding Sch Dist, California	1:15	pm	1966-85
BAA	3,010,000	Westminster, Colorado, Water	1:30	pm	1966-86

TUESDAY, MAY 11, 1965

A	15,000,000	ALABAMA STATE H'WAY AUTH, H'way Ser M, Rev Bidding with Merrill Lynch, Pierce, Fenner & Smith, Inc	Noon		1970-85
AA	100,000,000	CALIFORNIA STATE OF, Sch Ser HH & JJ Bidding with Bankers Trust Co	1:00	pm	1967-91
AA	10,000,000	CLEVELAND, OHIO, City Sch Dist, Sch Bldg Bidding with Glore, Forgan & Co	1:00	pm	1966-85
AA	16,863,000	DELAWARE STATE OF, Cap Imp Bidding with Kuhn, Loeb & Co	Noon		1966-85
	1,240,000	NEW HAVEN URBAN RENEWAL AGENCY, CONNECTICUT Bidding with Bacon, Stevenson & Co	1:00	pm	....
AA	30,000,000	NORTHERN INDIANA PUBLIC SERVICE CO, 1st Mtge Ser N Bidding with Halsey, Stuart & Co, Inc	1:00	pm	....
BA	2,500,000	NORTH SUBURBAN SANT SEW DIST, MINNESOTA, Sew Rev Bidding with B. J. Van Ingen & Co, Inc	10:00	pm	1969-97
A	3,500,000	ST. JOSEPH, MISSOURI, Sch Dist, Sch Bidding with American Securities Corp	1:00	pm	1966-85
A	6,000,000	SAN ANTONIO, TEXAS, I. S. D. Bidding with Philadelphia National Bank	1:00	pm	1971-80
A	2,000,000	TUCSON, ARIZONA, Sew System Bidding with Goldman Sachs & Co	1:00	pm	1968-85
A	5,000,000	TUCSON, ARIZONA, Water System Rev Bidding with Shields & Co	1:00	pm	1968-85
A	10,000,000	UNITED GAS IMPROVEMENT CO, 1st Mtge Bidding with Kidder, Peabody & Co	Noon		....
	2,000,000	Antioch, California, U. S. D.	1:30	pm	1966-85
A	1,600,000	Clovis, New Mexico, Municipal Sch Dist #1	5:00	pm	1966-70
	2,790,000	Delta Twp, Michigan, Sant Sew	9:00	pm	1966-94
	1,170,000	Denver, Colorado, Wat Ref	12:30	pm	....
	1,000,000	Enumclaw, Washington, Wat & Sew Rev	2:00	pm	1966-95
	1,270,000	Kane Co, Illinois, Sch Dist #101	8:30	pm	1967-79
	1,231,000	Harrison Co, Mississippi, Co Bldg & Seaport	12:30	pm	1966-90
~~BAA~~	~~1,850,000~~	~~Oldham Co, Kentucky, Sch Rev~~	~~Noon~~		~~1966-90~~
BAA	2,950,000	St. Bernard Parish, Louisiana, Various	1:00	pm	1967-95
~~BAA~~	~~3,255,000~~	~~White Bear Lake I. S. D. #624, Minnesota~~	~~10:00~~	~~pm~~	~~1967-85~~

WEDNESDAY, MAY 12, 1965

A	4,350,000	CHARLESTON CO, SOUTH CAROLINA, Pub Bldg Bidding with Halsey, Stuart & Co Inc	1:00	pm	1966-83
	2,000,000	ONEONTA, NEW YORK, City Sch Dist Bidding with Kidder, Peabody & Co	11:30	am	1966-95
BAA	1,650,000	RUSH, HENRIETTA, NEW YORK, C. S. D. #1 Bidding with Kidder, Peabody & Co	11:00	am	1965-89
AA	12,840,000	SACRAMENTO, CALIFORNIA, U. S. D. Bidding with Morgan Guaranty Trust Co of N. Y.	1:00	pm	1966-90
	800,000	Galloway Twp, New Jersey, Sch Dist	8:00	pm	1966-82
	900,000	Jefferson Davis Parish, Louisiana	Noon		1966-85
~~BAA~~	~~2,285,000~~	~~Robbinsdale I. S. D. #281, Minnesota~~	~~6:00~~	~~pm~~	~~1966-86~~
	1,500,000	St. Louis Co, Missouri, Parkway, Sch Dist	9:00	pm	1967-85

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THURSDAY, MAY 13, 1965

AA	870,000	Brown Co, Minnesota, Drain	12:30	pm	1966-80
	2,000,000	Jefferson Parish, Louisiana, Hosp Service Dist #1, Hospital	4:00	pm	1966-95
	~~1,100,000~~	~~Olmstead, Falls, Ohio, Sch Dist, Sch Imp~~	~~2:00~~	~~pm~~	~~1966-88~~
	1,000,000	Wayne Co, Michigan, Metro Wat System	Noon		1969-2003
	1,725,000	Wayne Co, Michigan, Metro Airport Rev	Noon		1966-90

FRIDAY, MAY 14, 1965

	2,544,000	University of North Carolina, Bd of Trustees	11:30	am	1967-2003

MONDAY, MAY 17, 1965

AA	8,200,000	Cook Co, Illinois, Evanston Twp H.S.D. #202	8:30	pm	1966-84
AA	6,485,000	Cook Co, Illinois, Evanston Comm Cons Sch Dist #65	8:30	pm	1967-84
	975,000	Pearsall, Texas, I.S.D.	10:00	pm	....

TUESDAY, MAY 18, 1965

	1,520,000	CLARK TWP, NEW JERSEY, Sch Dist Bidding with Kidder, Peabody & Co	8:00	pm	1967-84
AA	60,000,000	VIRGINIA ELECTRIC & POWER CO, 1st & Ref Mtge, Ser T Bidding with White Weld & Co	Noon		....
AA	965,000	Hamden, Connecticut, Sch	11:30	am	1966-84
	2,250,000	Hutchinson I.S.D. #423, Minnesota	4:00	pm	1966-88
	3,000,000	Knoxville, Tennessee, Wat Rev	11:00	am	1966-85
	2,400,000	Lafayette, Louisiana, Utility Rev	Noon		1967-94
	1,000,000	Mounds View, Minnesota, I.S.D. #621	10:00	pm	....
	1,640,000	Sinton, Texas, I.S.D.	9:30	pm	1966-80

WEDNESDAY, MAY 19, 1965

	14,000,000	INTERSTATE POWER CO, 1st Mtge Bidding with Merrill Lynch, Pierce, Fenner & Smith Inc	Noon		....
A	3,070,000	MIAMI, FLORIDA, Various Bidding with Kidder, Peabody & Co	Noon		1967-85
	125,000,000	PACIFIC TELEPHONE & TELEGRAPH CO, 35 Yr Debentures Bidding with Halsey, Stuart & Co Inc	....		....
A	2,675,000	PAWTUCKET, RHODE ISLAND, Pub Imp Bidding with White Weld & Co	11:00	am	1966-85
	960,000	Kane Co, Illinois, Sch Dist #129	....		....
	1,750,000	Pickens Co, South Carolina, Sch Dist	1:00	pm	1966-84

THURSDAY, MAY 20, 1965

	3,975,000	MANLIUS, POMPEY, etc, NEW YORK, C.S.D. #1 Bidding with Marine Trust of Western, New York	2:00	pm	1966-91
	1,500,000	Danville, Illinois, Sant Dist	1:00	pm	1968-83
	1,500,000	Florida Development Comm, Baker Co Rd Rev	3:30	pm	1967-92
	1,500,000	Genesee Co, Michigan, Sew Disposal Dist #3	8:00	pm	1967-2003
	4,750,000	Louisiana Polytechnical Institute, Dining Hall Rev	....		....

MONDAY, MAY 24, 1965

	3,790,000	Louisiana State University & Agricultural & Mechanical Coll	Noon		1967-2004

TUESDAY, MAY 25, 1965

A	5,500,000	AMARILLO, TEXAS, Park Bidding with Eastman Dillon, Union Securities & Co	3:30	pm	....
	6,000,000	CADDO PARISH, LOUISIANA, Sch Dist Bidding with Morgan Guaranty Trust Co of N.Y.	Noon	1966-	1966-85
	4,000,000	JORDAN, UTAH, Sch Dist Bidding with Kidder, Peabody & Co	10:00	pm	1967-76
	6,000,000	METROPOLITAN EDISON CO, Debentures Bidding with White Weld & Co	11:00	am	....
	15,000,000	PENNSYLVANIA STATE HIGHWAY & BRIDGE AUTH, Rev Bidding with Drexel & Co	1:00	pm	1966-85
	10,000,000	PORT OF SEATTLE COMM, WASHINGTON, Wat Front Fac & Imp Bidding with White Weld & Co	2:00	pm	1967-75
	25,000,000	TENNESSEE, STATE OF, Various Bidding with First National Bank of Memphis	....		....
	6,000,000	Beverly Hills, California, U.S.D.	Noon		1966-85
	1,000,000	Boise Jr College Dist, Idaho	....		....
	2,400,000	Fairfield, Suisun Sew Dist, California, Sew	....		....
	1,700,000	Smith Co, Texas, Hospital Center	Noon		....
	4,000,000	Washoe Co, Sch Dist, Nevada, School	....		....
	5,780,000	Winono Special Sch Dist #5, Minnesota	4:00	pm	1968-90

WEDNESDAY, MAY 26, 1965

	15,000,000	LOS ANGELES, CALIFORNIA, Dept of Wat & Pwr Bidding with Glore Forgan & Co	11:00	am	1966-95
AAA	133,280,000	PUBLIC HOUSING ADMINISTRATION, New Housing Bidding with First National City Bank	....		....

RAND & CO., INC.

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		MONDAY, MAY 10, 1965			
	1,583,000	CHERRY HILL, NEW JERSEY, Sew & Bldg Bidding with Halsey, Stuart & Co Inc	7:00	pm	1966-88
		TUESDAY, MAY 11, 1965			
AA	30,000,000	NORTHERN INDIANA PUBLIC SERVICE CO, 1st Mtge Ser N Bidding with Halsey, Stuart & Co Inc	Noon		....
A	10,000,000	UNITED GAS IMPROVEMENT CO, 1st Mtge Bidding with Kidder, Peabody & Co	11:00	am	....
	2,790,000	Delta Twp, Michigan, Sant Sew	8:00	pm	1966-94
	2,950,000	St. Bernard Parish, Louisiana, Various	Noon		1967-95
		WEDNESDAY, MAY 12, 1965			
	800,000	Galloway Twp, New Jersey, Sch Dist	7:00	pm	1966-82
	900,000	Jefferson Davis Parish, Louisiana	11:00	am	1966-85
		THURSDAY, MAY 13, 1965			
	2,000,000	Jefferson Parish, Louisiana, Hospital Service Dist #1, Hosp Imp Rev	3:00	pm	1966-95
		TUESDAY, MAY 18, 1965			
AA	60,000,000	VIRGINIA ELECTRIC & PWR CO, 1st & Ref Mtge, Ser T Bidding with White Weld & Co	11:00	am	....
	2,300,000	Fairfield, Suisun Sew Dist, California, Sew	....		....
	2,400,000	Lafayette, Louisiana, Utility Rev	11:00	am	1967-94
		WEDNESDAY, MAY 19, 1965			
	14,000,000	INTERSTATE POWER CO, 1st Mtge Bidding with Merrill Lynch, Pierce, Fenner & Smith, Inc	11:00	am	....
	30,000,000	LOS ANGELES, CALIFORNIA, Airport Rev Bidding with Eastman Dillon, Union Securities & Co	....		....
		TUESDAY, MAY 25, 1965			
	15,000,000	PENNSYLVANIA STATE HIGHWAY & BRIDGE AUTH, Rev Bidding with Drexel & Co	Noon		....
		WEDNESDAY, MAY 26, 1965			
	1,950,000	East Baton Rouge Parish, Louisiana, Jail	....		....
		TUESDAY, JUNE 1, 1965			
A	5,000,000	East Baton Rouge Parish, Louisiana, C.S.D. #1	Noon		1966-79
	4,000,000	Greater Cincinnati Airport, Ohio, Airport Rev	....		....
	4,000,000	Kento Co, Kentucky, Airport Bd, Airport Rev	....		....
		WEDNESDAY, JUNE 16, 1965			
	15,000,000	LOS ANGELES, CALIFORNIA, Dept of Wat & Pwr Bidding with Glore, Forgan & Co	....		....
		TUESDAY, JUNE 22, 1965			
	900,000	La Salle Parish, Louisiana, Pub Imp	....		....
		THURSDAY, JUNE 24, 1965			
	4,600,000	Allentown City Dist Auth, Pennsylvania, Sch Rev	....		....
		TUESDAY, JULY 13, 1965			
	13,700,000	Saginaw, Midland, Municipal Wat Supply Corp, Michigan Water Fac	....		....

While the accuracy of the information contained herein is not guaranteed by us, it has been taken from sources which we believe to be reliable.

RAND & CO.

ONE WALL STREET NEW YORK, N. Y. 10005

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Southfield, Michigan, Pub Sch Dist		3189
South Middleton Sch Auth, Pennsylvania, School Rev		3077
South Orange & Maplewood, New Jersey, School Dist		3082
South Plainfield, New Jersey, Gen Imp	BA	3191
South Ripley, High Sch Bldg Corp, Indiana, 1st Mtge Rev		3069
South San Francisco, California, U.S.D.	A	3066
Southwestern Henry Co, Sch Bldg, Corp, Indiana	BAA	3185
South Windsor, Connecticut, School	A	3186
Spalding Co, Georgia, Wat System	A	3102
Sparks, Nevada, Sewer	BAA	3124
Sparta Twp, New Jersey, Sch Dist	BAA	3174
Spokane, Washington, Airport	AA	3116
Spring Branch, Texas, I.S.D.	BAA	3073
Springfield, Illinois, Wat Rev	AA	3167
Springfield, Massachusetts, Var Purp	AA	3162
Springfield, Massachusetts, Wat Reservoir	AA	3170
Springfield, Michigan, Sch Dist		3079
Springfield, Missouri, Industrial, G.O.		3199
Springfield Local Sch Dist, Ohio	BAA	3131
Springfield, Pennsylvania, Sch Dist, Montgomery Co Sch Dist	A	3087
Stamford, Connecticut, Various	AA	3099
Stanton, Delaware, Sch Dist #38	A	3076
Stephens Relief Drainage Dist, Michigan	A	3110
Sterling Twp, Michigan, Wat Supply & Sewer Sys Rev		3160
Stickney Twp, Illinois, Road Dist, Rd Imp, G.O.	BAA	3186
Stone Mountain Memorial Assoc, Georgia, Park Facility	A	3152
Stoughton, Massachusetts, School	A	3090
Stratford, Connecticut, Pub Imp	AA	3067
Stroudsburg Area Sch Auth, Pennsylvania, Sch Revenue		3106
Suburban Erie Bldg Auth, Pennsylvania		3167
Suffolk Co, New York, Pub Imp	A	[illegible]
Suffolk Co, Water Auth, New York, Wat Revenue	A	3156
Sullivan Co, New York, Pub Imp	A	3176
Summit Co, Ohio, Sant Imp Dist #74	A	[illegible]
Sunnyvale, California, City Imp	BAA	[illegible]
Sweetwater Co, Wyoming, Courthouse	A	[illegible]
Sweetwater Jr Coll Dist, California	AA	[illegible]
Tacoma, Washington, Light & Pwr Ref Rev		[illegible]
Talladega, Industrial Development Bldg, Alabama, [illegible], Industrial Rev		[illegible]
Tallahassee, Florida, Elec & [illegible]	BAA	[illegible]

ISSUE:	RATING	PAGE
Tamaqua Boro Auth, Pennsylvania, Sch Rev		[illegible]
Tampa, Florida, Cap Imp Ser F, Rev	A	[illegible]
Tarrant Co, Texas, Coliseum & Aud	A	[illegible]
Taunton, Massachusetts, Elec Loan	AA	[illegible]
Tempe, Arizona, Sew & Wat	A	[illegible]
Temple, Texas, Various	A	[illegible]
Tennessee, Highway Higher Education	AA	[illegible]
Terre Haute, Indiana, Sant Dist	AA	[illegible]
Texas University of, Perm Univ Fund	AAA	[illegible]
Texas Water Development Bd, Wat, G.O.	AAA	[illegible]
Toledo, Ohio, Sew Sys, Mtge Rev	AA	[illegible]
Toledo, Lucas Co, Port Auth, Ohio, Presque Isle Expansion Rev	BAA	[illegible]
Toledo, Ohio, University of Toledo, Dorm	AA	[illegible]
Tomah (City) Adrian, Byron, Wisconsin, Sch Dist #1	A	[illegible]
Toms River, New Jersey, Sch Dist	BAA	[illegible]
Tonawanda, New York, Town Imp	A	[illegible]
Topeka, Kansas, Special Asst		[illegible]
Traverse City, Michigan, Water Rev	A	[illegible]
Triunfo Co Sant Dist, California		[illegible]
Tulsa Co, Oklahoma, County Fair	A	[illegible]
Tulsa Co, Oklahoma, I.S.D. #1	A	[illegible]
Two Rivers, Wisconsin, Corp Purp		[illegible]
Tyler, Texas, Imp	A	[illegible]
Tyler, Texas, Sch Dist	A	[illegible]
Union Co, Regional H.S.D. #1, New Jersey	A	[illegible]
Union Co, New Jersey, Pub Imp Park	AA	[illegible]
Union, North Sch Bldg Corp, Indiana 1st Mtge Rev	BAA	[illegible]
Union & Owego, New York, C.S.D. #1	AA	[illegible]
University of Arizona, Stadium Rev		[illegible]
University of California, Housing Rev		[illegible]
University of California, Parking Sys Rev		[illegible]
University of Illinois, Medical Center Rev	A	[illegible]
University of Idaho Bd of Regents, Bldg Rev		[illegible]
University of Montana, Bd of Ed, Coll Rev		[illegible]
University of Oklahoma, Bd of Regents, Housing System		[illegible]
University System Bldg Auth, Georgia, Student Housing Rev	A	[illegible]
University of Virginia, Field House & Gym		[illegible]
Upper Arlington, Ohio, City Sch Dist	A	[illegible]
Upper Arlington, Ohio, City Sch Dist	A	[illegible]
Upper Bucks Co, Sch Auth, Pennsylvania, School Rev		[illegible]
Upper Bucks Tech Sch Auth, Pennsylvania		[illegible]
Upper Dublin Sch Auth, Pennsylvania, Sch Rev		[illegible]
Upper Freehold Reg Sch Dist, New Jersey		[illegible]
Upper Merion Twp Sch Auth, Pennsylvania		[illegible]
Utica, New York, City Hall, Fire House	A	[illegible]
Utica, New York, City Sch Dist	AA	[illegible]
Utica, New York, Var Purp	AA	[illegible]
Valdosta, Georgia, School	[illegible]	[illegible]
Valdosta, Georgia, Wat & Swr Rev	[illegible]	[illegible]
Vanceburg, Kentucky, [illegible]	[illegible]	[illegible]
Vancouver, Washington, Various	[illegible]	[illegible]
Vandalia, Illinois, [illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

ORIGINAL OFFERING SCALES

ISSUE:	RATING	PAGE
Virginia Beach, Virginia, Wat, Sew & Gen Imp		3180
Virginia Pub Sch Auth, Sch	AA	3104
Vista Sant Dist, California, Sew, G.O.	BAA	3075
Wadena I.S.D. #819, Minnesota	BAA	3090
Wake Co, North Carolina, Sch	AA	3201
Wallingford, Connecticut, Sew & Wat	AA	3178
Walsenburg, Colorado, Elec Light Pwr Ref		3152
Waltham, Massachusetts, Various		3141
Walton Hills, Ohio, Wat Sys Imp	BA	3120
Warren, Michigan, C.S.D.	BAA	3091
Warren Woods, Public Sch Dist, Michigan	BAA	3065
Warren Co, Mississippi, Co Sch Dist, Sch		3090
Warren, Ohio, City Sch Dist, Sch	A	3086
Warminister Twp Sch Auth, Pennsylvania, Sch Rev		3189
Warrensville, Ohio, Gen & Spec Asst	BAA	3104
Warwick & Chester, New York, C.S.D. #1	BAA	3100
Washington Correctional Institute	AA	3206
Washington State of, School	A	3206
Washington Co, Oklahoma, I.S.D. #30, Sch	A	3184
Washington Co, Oregon, Sch Dist #48	A	3075
Washington Sub Sant Dist, Maryland, Prince George & Montgomery Co	A	3155
Washington Sub Sant Dist, Maryland, Var	A	3155
Washington Sub Sant Dist, Maryland, Var	A	3111
Washington Toll Bridge Auth, Bridge Const Rev		3164
Washington Twp, New Jersey, Sch Dist School	BAA	3176
Washington University of, Gen Tuition, Rev Fee		3108
Washington University of, Housing Sys Rev		3066
Washoe Co, Nevada, Co Sch Dist	A	3129
Watauga Co, North Carolina, School	BAA	3117
Waterbury, Connecticut, Var Purp	AA	3136
Waterford Twp, Michigan, Sch Dist, Ser A	BAA	3177
Waterloo, Iowa, Sewer		3188
Waycross, Georgia, School	BAA	3080
Wayne, Michigan, Comm Sch Dist	BAA	3079
Wayne Co, Michigan, Airport Rev, Metro Sew System Ser 5	A	3159
Wayne Co, Michigan, Grosse Ile, Sant Interceptor, Drain & Treatment Plant Dist	A	3180
Wayne Co, Michigan, Lafler Storm Drain Dist, Drain	A	3193
Wayne Co, Michigan, Livonia Drain Dist	A	3194
Wayne Co, Michigan, Livonia Drain Dist	A	3085
Wayne Co, Michigan, Sewer	A	3104
Wayne Co, Michigan, Venoy Drain Dist, Drain	A	3198
Weber Co, Utah, Sch Dist	A	3166
Webster, New York, Pub Imp	BAA	3158
Webster, Penfield, Ontario, Walworth New York, C.S.D. #1	BAA	3089
Weld Co, Colorado, Sch Dist #6	AA	3107
West Allis, Wisconsin, Corp Purp	A	3147
West Carrollton, Exempt Village Sch Dist, Ohio	A	3066
West Clermont, Local Sch District, Ohio	BAA	3147
Western Illinois University (Macomb, Illinois) Residence Hall Rev		3089
Western Kentucky State Coll	BAA	3146
Western Municipal Wat Dist, California, Water Wks Dist #U8		3194
Westfield, New Jersey, Sch Dist	AA	[illegible]
Westlake, Ohio, City Sch Dist	BAA	[illegible]
West Milford Twp, New Jersey, Sch Dist		3105
Westminster, Maryland, Wat Sys	A	3202
West Orange, Texas, I.S.D.		3094
West Palm Beach, Florida, Utility Tax Revenue	BAA	3110
Westport, Connecticut, School	AA	3091
West St. Paul, Minnesota, Imp	BAA	3200
West Seneca & Orchard Park, New York, C.S.D. #1	BAA	3090
West Springfield, Massachusetts, Sch	AA	3158
West Virginia, Road	A	3166
West Virginia, Road	A	3196
West Virginia State of, Road	A	3103
West Virginia, Bd of Education, Reg Fee Rev		3170
West Virginia University of, Dorm Rev		3091
West Virginia University, Reg Fee Rev	BAA	3173
West Warwick, Rhode Island, Sch	A	3085
Weymouth, Massachusetts, Various	A	3158
Whatcom Co, Washington, Bellingham Sch Dist #501	A	3174
Wheeling, West Virginia, Wat Rev	A	3122
White Co, Tennessee, School		3147
Whitemarsh Twp Auth, Pennsylvania, Sewer & Incinerator		3179
Wichita, Kansas, Imp	A	3119
Wichita, Kansas, Various	A	3184
Wichita Falls, Texas, G.O.	A	3158
Will Co, Illinois, Pub Bldg Comm, County Building	A	3146
Williamsburg, Virginia, Sch Water	AA	3123
William S. Hart, H.S.D., California	BAA	3072
Willoughby, Eastlake City Sch Dist, Ohio	BAA	3182
Wilmington, Delaware, Various	AA	3104
Wilmington, North Carolina, Var Purp	A	3196
Wilmington, North Carolina, Var	A	3122
Wilmington City, Sch Dist, Ohio, Sch Imp	A	3081
Willingboro Twp, New Jersey, Sch Dist	BAA	3127
Wilson, North Carolina, Elec Light	A	3073
Winston, Salem, North Carolina, Var	AA	3076
Winthrop, Massachusetts, Sch	A	3150
Wisconsin St Colleges Bldg Corp, Dorm & Dining Rev		3064
Wisconsin University Bldg Corp, Dorm Rev	AA	3128
Woburn, Massachusetts, Var Purp, Lot A	A	3160
Woodbridge Twp, New Jersey, G.O.	BAA	3123
Wood Co, West Virginia, School, Board of Education		3200
Woodland, California, Imp	A	3115
Worcester, Massachusetts, Var, Lot A & B	AA	3150
Worthington, Ohio, Exempt Village Sch Dist	A	3196
Wyandotte, Kansas, U.S.D. #501		3070
Wyoming, Michigan, Sch Dist	BAA	3078
Wyoming, Michigan, Spec Asst	BAA	3186
Wyoming, Michigan, Wat Sys Rev		3136
Wyoming, Michigan, Wat Supply Sys		3165
Xenia, Ohio, City Sch Dist	A	[illegible]
Yakima, Washington, G.O.	A	[illegible]
Yazoo Co, Mississippi, Port Imp	[illegible]	[illegible]
Yorktown, Somers, Cortlandt, Putnam, Valley, Carmel & Phillipstown, New York, C.S.D. #1	BAA	[illegible]
Youngstown, Ohio, Highway Imp	A	[illegible]
Ypsilanti, Michigan, Wat, Sew Rev	A	[illegible]
Ysleta, I.S.D., Texas	[illegible]	[illegible]
Ysleta, I.S.D., Texas	[illegible]	[illegible]
Yucaipa Jt. U.S.D., California	[illegible]	[illegible]
Yucca Valley, Co Wat Dist, [illegible] Water, G.O.	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

ORIGINAL OFFERING SCALES

	ARLINGTON, TEXAS Wat & Sew Sys Rev	SAYREVILLE, NEW JERSEY Water & Improvement	AUSTIN, MINNESOTA I.S.D.#492	NEW CASTLE CO. DELAWARE Alfred I. Dupont Sch Dist #7	ST. TAMMANY PARISH, LOUISIANA Parish Wide Sch Dist #12	HIGHLAND LOCAL SCHOOL DIST. OHIO	HURON, SOUTH DAKOTA I.S.D. #4	RYE, NEW YORK U.F.S.D#5	HENRY CO. VIRGINIA School	BELLINGHAM, MASSACHUSETTS School	ESSEX CO. NEW JERSEY Imp
Amount (M)	800	2,500	2,358	2,207	1,995	1,185	1,850	1,070	1,000	990	5,830
Coupon Rate	(1)	3.20%	(2)	3 1/4%	(3)	3 3/8%	(4)	3.10%	3.30%	3.20%	2 7/8%
Month Maturity	Apr 1	May 1	Jan 1	May 1	Feb 1	Dec 1	Apr 1	May 1	Nov 1	Mar 1	Apr 1
Date of Sale	4/6	4/7	4/7	4/7	4/7	4/7	4/7	4/7	4/7	4/7	4/8
Moody's Rating	....	A	A	A	BAA	....	A	A	A	A	AA
Callable Feature	....	....	....	....	(a)	....	(b)	....	....	....	....
1964											
1965											
1966		2.35		2.30		2.40		2.35	2.25	2.25	2.25
1967		2.50		2.50		2.55		2.50	2.25	2.50	2.35
1968		2.60		2.60	2.70	2.65	2.60	2.60	2.40	2.60	2.50
1969	2.80	2.70		2.70	2.80	2.75	2.70	2.70	2.50	2.70	2.60
1970	2.90	2.75		2.75	2.90	2.85	2.75	2.75	2.60	2.80	2.65
1971	2.95	2.80		2.80	3.00	2.90	2.80	2.80	2.70	2.85	2.70
1972	3.00	2.85		2.85	3.05	2.95	2.85	2.85	2.75	2.90	2.70
1973	3.00	2.90	2.85	2.90	3.10	2.95	2.90	2.90	2.75	2.95	2.75
1974	3.05	2.95	2.90	2.95	3.15	3.00	2.95	2.90	2.80	2.95	2.75
1975	3.10	2.95	2.95	2.95	3.20	3.00	2.95	2.95	2.80	3.00	2.80
1976	3.15	3.00	3.00	3.00	3.25	3.05	3.00	2.95	2.85	3.00	2.80
1977	3.20	3.00	3.00	3.00	3.30	3.10	3.00	3.00	2.85	3.05	2.85
1978	3.25	3.00	3.05	3.00	3.35	3.15	3.05	3.00	2.90	3.10	2.85
1979	3.25	3.05	3.10	3.05	3.40	3.20	3.05	3.05	2.90	3.10	2.90
1980	3.30	3.10	3.10	3.05	3.45	3.25	3.10	3.05	2.95	3.15	2.90
1981	3.30	3.10	3.125	3.10	3.50	3.25	3.15	3.10	2.95	3.15	
1982	3.30	3.15	3.15	3.10	3.50	3.30	3.20	3.10	3.00	3.20	
1983	3.35	3.15	3.20	3.15	3.55	3.30	3.20	3.15	3.00	3.20	
1984	3.35	3.20	3.20	3.15	3.55	3.35	3.25	3.15	3.00	3.25	
1985	3.35	3.20	3.25	3.20	3.60	3.35	3.25		3.05	3.25	
1986	3.40	3.25	3.25	3.20	3.60						
1987	3.40	3.25		3.20	3.60						
1988	3.40	3.30		3.25	3.65						
1989	3.40	3.30		3.25	3.65						
1990		3.30		3.25	3.65						
1991					3.70						
1992					3.70						
1993					3.70						
1994					3.70						
1995					3.70						
1996											
1997											
1998											
1999											
2000											
2001											
2002											
2003											
2004											

(a)	1981-95
callable inversely	1980
(b)	1981-85
callable inversely	1980

(1)	
5%	1969-75
3 3/8%	1976-77
3.30%	1978-83
3.40%	1984-89
(2)	
2.90%	1973
3%	1974-77
3.10%	1978-80
3 1/8%	1981
3.20%	1982-84
3 1/4%	1985-86
(3)	
3 1/2%	1968-84
3.60%	1985-90
3.70%	1991-95
(4)	
2.80%	1968-71
3%	1972-77
3.10%	1978-81
3.20%	1982-83
3 1/4%	1984-85

April 8, 1965

April 12, 1965 - Dow Jones Municipal Average 3.23

While the accuracy of the information contained herein is not guaranteed by us, it has been taken from sources which we believe to be reliable.

MOODY'S RATING

BAA 1,853,000 CLARK COUNTY SCHOOL DISTRICT, NEVADA, MAY 1

659M	5%	1971	3.30	633M	4%	1972	3.40
				561M	3 1/2%	1973	3.45

NR 3,000,000 COMMONWEALTH OF KENTUCKY, PARKS REV, APRIL 1

100M	4 1/2%	1967	2.75	120M	3 1/2%	1980	3.50
100M	4 1/2%	1968	2.90	120M	3 1/2%	1981	3.55
100M	4 1/2%	1969	3.00	120	3.60%	1983	3.60
120M	4 1/2%	1970	3.10	120M	3.60%	1983	3.60
120M	4 1/2%	1971	3.15	120M	3.60%	1984	3.65
120M	4 1/4%	1972	3.20	120M	3.60%	1985	3.65
120M	3 1/4%	1973	3.25	120M	3.70%	1986	3.70
120M	3.30%	1974	3.30	110M	3.70%	1987	3.70
120M	3.30%	1975	3.30	110M	3 3/4%	1988	3.75
120M	3.30%	1976	3.35	110M	3 3/4%	1989	3.75
120M	3.40%	1977	3.40	110M	3 3/4%	1990	3.75
120M	3.40%	1978	3.45	110M	3%	1991	3.90
120M	3 1/2%	1979	3.50	110M	3%	1992	3.90

BAA 6,305,000 DETROIT, MICHIGAN, REHABILITATION & SEW, G.O. DATED MAY 1, 1965
DUE: MAY 1,

325M	3 1/4%	1968	2.70	635M	5%	1976	3.15
10M	3 1/4%	1969	2.80	735M	5%	1977	3.20
125M	5%	1969	2.80	750M	5%	1978	3.20
275M	5%	1970	2.90	3.90M	5%	1979	3.25
250M	5%	1971	2.95	810M	3 1/4%	1980	100
				750M	3 1/4%	1981	100
				450M	3.30%	1982	100
				800M	3.30%	1983	100

NR 6,595,000 ILLINOIS STATE UNIVERSITY AT NORMAL, DORM REV, OCTOBER 1,

105M	5%	1969	2.85	190M	3.80%	1985	3.55
110M	5%	1970	2.95	200M	3.80%	1986	3.60
115M	5%	1971	3.00	205M	3 3/4%	1987	3.60
120M	5%	1972	3.05	215M	3 3/4%	1988	3.60
120M	5%	1973	3.10	220M	3 3/4%	1989	3.65
125M	5%	1974	3.15	230M	3 3/4%	1990	3.65
105M	5%	1975	3.20	240M	3 3/4%	1991	3.65
135M	5%	1976	3.25	155M	3.3/4%	1993	3.70
140M	4 1/4%	1977	3.30	265M	3 3/4%	1994	3.70
145M	4 1/4%	1978	3.35	275M	3 3/4%	1995	3.70
125M	4%	1979	3.40	285M	3 3/4%	1996	3.70
160M	4%	1980	3.45	130M	3 3/4%	1998	3.75
165M	3.90%	1981	3.45	320M	3 3/4%	1999	3.75
170M	3.90%	1982	3.50	330M	3 3/4%	2000	3.75
175M	3.80%	1983	3.50	345M	3.3/4%	2001	
160M	3.80%	1984	3.55	355M	3 3/4%	2002	
				370M	3 3/4%	2003	

AA 275,000 LINCOLN, NEBRASKA, WATER REV, DATED APRIL 1, 1965 , FIRST COUP, OCTOBER 1, 1965
DUE: APRIL 1,

20M	5%	1968	2.50	40M	3.20%	1976	2.90
10M	5%	1969	2.60	40M	3 1/4%	1977	2.95
35M	5%	1971	2.70	40M	3 1/4%	1978	2.95
35M	3 3/4%	1972	2.75	10M	3 1/4%	1979	3.00
10M	3 3/4%	1973	2.80	20M	3 1/4%	1980	3.00
15M	3.20	1974	2.85				

BAA 210,000 MINDEN, LOUISIANA, WATER & ELEC REV, JANUARY 1

70M	5%	1974	3.25	5M	4%	1975	3.25
				30M	3 3/4%	1976	3.30
				30M	3 1/2%	1984	3.55
				75M	3 1/2%	1987	3.65

RAND & CO., INC.

ONE WALL STREET NEW YORK 10005, N. Y.

Telephone WHitehall 4-3430

Teletype NY 1-838
212-571-0178

The following list is comprised of the more important Municipal issues scheduled for sale on the dates indicated. Time of sale is given in Eastern Standard Time. The Moody's Rating is that given to outstanding bonds and will not necessarily be the same for the new issues:

INCLUDED ARE NEW ISSUES ON WHICH WE EXPECT TO BID

		MONDAY, APRIL 19, 1965			
AA	1,150,000	Lake Co, Illinois, Comm H.S.D. #115, Bldg	9:00	pm	1966-85
	950,000	San Lorenzo Valley, California, U.S.D.	2:00	pm	1966-89
		TUESDAY, APRIL 20, 1965			
A	1,700,000	CHARLES CO, MARYLAND, Sch & Library	Noon		1966-85
		Bidding with Kidder, Peabody & Co			
AA	25,000,000	LOS ANGELES, CALIFORNIA, U.S.D.	....		....
		Bidding with Halsey, Stuart & Co Inc			
A	2,583,000	MAMARONECK, NEW YORK, U.F.S.D. #1	2:00	pm	1966-93
		Bidding with Kidder, Peabody & Co			
A	7,000,000	PITTSBURGH, PENNSYLVANIA, School	2:00	pm	1966-90
		Bidding with Lehman Bros			
BAA	1,445,000	Bemidji I.S.D. #31, Minnesota	Noon		1966-79
A	1,200,000	Brookfield, Connecticut, School	11:30	am	1966-85
	2,000,000	Marianna, Florida, Imp Rev	6:00	pm	1965-2004
	676,000	Rockville Centre, New York, Imp, Elec Utility	2:00	pm	1965-94
	1,270,000	Shelby Co, Kentucky	Noon		1965-89
		WEDNESDAY, APRIL 21, 1965			
A	11,000,000	BALTIMORE CO, MARYLAND, Imp	11:00	am	1967-95
		Bidding with Phelps, Fenn & Co			
AA	30,000,000	FLORIDA POWER CORP, 1st Mtge	11:00	am	....
		Bidding with Halsey, Stuart & Co, Inc			
	1,940,000	Bennington Co, Vermont, U.H.S.D. #14	11:00	am	1966-85
AA	1,500,000	Christian Co, Illinois, Taylorville Sch Dist #3	9:00	pm	1967-84
AA	1,950,000	Fort Dodge, Iowa, Comm Sch Dist	8:00	pm	1966-84
	1,100,000	Houston Co Hospital Board, Alabama	Noon		1966-90
	2,270,000	~~Lake Boulevard Relief Drain Dist, Michigan~~	~~11:00~~	am	1965-94
	1,097,000	Madison Co, Illinois, Comm Unit Sch Dist #7	8:30	pm	....
A	2,000,000	Portsmouth, Virginia, Imp	11:00	am	1966-85
A	1,000,000	Union, South Carolina, Pub Utility Sys Rev	....		1966-85
		TUESDAY, APRIL 22, 1965			
BAA	6,772,000	BROOKHAVEN, NEW YORK, C.S.D. #11	2:00	pm	1966-94
		Bidding with Bankers Trust Co			
BAA	8,244,000	NIAGARA, WHEATFIELD, etc, NEW YORK, C.S.D. #11	2:00	pm	1966-93
		Bidding with Kidder, Peabody & Co			
A	4,400,000	Bethlehem City Center Auth, Pennsylvania, Bldg Rev	2:00	pm	1966-95
	4,475,000	Carman Sch Dist, Michigan, Sch	8:00	pm	1966-81
	850,000	Iowa City, Iowa, Sew Rev	....		....
BAA	2,500,000	Lafayette Parish, Louisiana, Courthouse	3:00	pm	1967-95
	1,788,000	Paterson, New Jersey, Various	11:00	am	1966-90
BAA	850,000	Pine City, Minnesota, I.S.D. #578	2:00	pm	1967-88
	1,750,000	Sherrill, New York, City Sch Dist	11:00	am	1966-95
		FRIDAY, APRIL 23, 1965			
	5,611,000 Shrs	CHRYSLER CORPORATION, Common Stock	9:00	am	....
		Bidding with The First Boston Corporation			
	1,000,000	Copiah Co, Mississippi, Supervisors Dist, Industrial	10:00	am	....
		MONDAY, APRIL 26, 1965			
A	7,000,000	HARRIS CO, TEXAS, Flood Control Dist	Noon		1966-85
		Bidding with Morgan Guaranty Trust Co of N.Y.			
A	3,000,000	Harris Co, Texas, Workhouse & County Prison Farm	Noon		1966-85
	4,465,000	Moon Schools U.S.D., Auth, Pennsylvania	7:00	pm	1966-2000
	3,450,000	San Jose, California, Parking Revenue	9:00	pm	1967-95
		TUESDAY, APRIL 27, 1965			
	71,030,000	MASSACHUSETTS, Various Purposes	11:00	am	1966-2015
		Bidding with First National City Bank of N.Y.			

While the accuracy of the information contained herein is not guaranteed by us, it has been taken from sources which we believe to be reliable.

TUESDAY, APRIL 27, 1965

	6,300,000	NEW YORK STATE DORM AUTH Bidding with Wertheim & Co	[illegible]	am	1967-95
	8,000,000	SANTA CLARA, CALIFORNIA, Highway, Ser E Bidding with Salomon Brothers & Hutzler	[illegible]	pm	1966-85
A	7,000,000	TUCSON, ARIZONA, Wat & Sew Rev Bidding with Shields & Co	....		....
	15,000,000	WASHINGTON SUBURBAN SANT DIST, MARYLAND, Gen Const & Wat Bidding with Glore, Forgan & Co	11:00	am	1966-95
	5,500,000	YOUNGSTOWN, OHIO, Urban Renewal Bidding with Northern Trust Co	11:00	am	1966-90
A	1,185,000	Los Altos, California, Imp	4:00	pm	1967-90
	1,200,000	Pensacola, Florida, Wat Rev	11:00	am	1966-85
AA	1,500,000	St. Louis, Missouri, Sch Dist	2:30	pm	1966-84
A	2,575,000	South Newton Sch Bldg Corp, Indiana, 1st Mtge Rev	2:00	pm	1967-94

WEDNESDAY, APRIL 28, 1965

	18,000,000	HAWAII, Various Bidding with Morgan Guaranty Trust Co of N.Y.	....		1968-85
	16,000,000	HOUSTON, TEXAS, Airport Rev Bidding with Eastman Dillon, Union Securities & Co	11:00	am	....
	27,660,000	INDIANAPOLIS, MARION CO, INDIANA, Bldg Auth, Bldg Ref Bidding with Goldman Sachs & Co	11:00	am	....
	2,550,000	WESTERN KENTUCKY ST COLL BD OF REGENTS, House & Dining Rev Bidding with F. S. Smithers & Co	....		....
	20,000,000	WEST VIRGINIA, Highway Const Bidding with Halsey, Stuart & Co Inc	Noon		1966-98
	840,000	Foxborough, Massachusetts, School	10:00	am	1966-85
	4,000,000	Mobile Co, Alabama, Bd of Sch Comm, Cap Outlay Warrents	2:00	pm	1966-85
	1,000,000	Richlands Co, South Carolina, Sch Dist	Noon		1967-86
	900,000	Thiensville & Mequon, Wisconsin, Sch Dist #3	8:00	pm	1966-85

THURSDAY, APRIL 29, 1965

	5,500,000	BOWLING GREEN UNIVERSITY Bidding with Phelps, Fenn & Co	Noon		1967-2004
	2,934,000	WAYNE TWP, NEW JERSEY, Sch Dist Bidding with Phelps, Fenn & Co	7:00	pm	1967-94
	3,250,000	Beaufort Co, Wat Auth, South Carolina, Wat Wks Sys	Noon		1966-2002
	1,600,000	Islip & Brookhaven, New York, U.F.S.D. #5	1:00	pm	1966-94
	2,844,000	Texas St Teachers College Bd of Regents, Housing System	....		1967-2014

MONDAY, MAY 3, 1965

	2,000,000	ATLANTA, GEORGIA, Wat Wks Rev Bidding with Courts & Co	....		....
	3,765,000	Florham Park Sew Auth, New Jersey, Sew Rev	....		....
BAA	1,995,000	Fridley, Minnesota, Imp, Civic Center, Wat Wks	9:00	pm	....
	1,600,000	Huron, Sch Dist, Michigan	7:30	pm	1966-90
	1,145,000	Jurupa, U.S.D., California	1:00	pm	1966-85
BAA	2,615,000	Mesquite, Texas, I.S.D.	....		....

TUESDAY, MAY 4, 1965

	1,160,000	Coconino Co, Arizona, Sch Dist #1	1:00	pm	1968-77
	2,640,000	Coconino Co, Arizona, High Sch Dist, Sch	1:00	pm	1966-77
	4,250,000	San Jose, California, U.S.D.	1:00	pm	1966-85

WEDNESDAY, MAY 5, 1965

	8,545,000	CINCINNATI, OHIO, Various Bidding with Bankers Trust Co	Noon		1966-98
	4,850,000	JACKSONVILLE PORT AUTH, FLORIDA, Port Auth Rev Bidding with Lehman Bros	....		....
	23,075,000	PENNSYLVANIA ST PUB SCH BLDG AUTH, Sch Lease Rev Bidding with Drexel & Co	Noon		1965-2004
AA	8,200,000	Cook Co, Illinois, Evanston Twp, H.S.D. #202	8:30	pm	1966-84
	1,530,000	Willmar, Minnesota, Utility Rev Ref	2:00	pm	....

THURSDAY, MAY 6, 1965

A	40,000,000	COLUMBIA GAS SYSTEM INC, Debentures Bidding with Merrill Lynch, Pierce, Fenner & Smith Inc	11:00	am	....
	15,000,000	METRO SEATTLE, WASHINGTON, Sew Rev Bidding with The First Boston Corporation	1:00	pm	1972-2004
	3,500,000	Bellevue, Washington, Sew Dist, Sew Rev	....		....
AA	5,692,000	Fort Collins, Colorado, Wat & Sew Sys Rev	3:30	pm	1967-85
	950,000	Marion Co, Tennessee, Sch	2:00	pm	1969-79
	1,810,000	Ottawa Co, Michigan, Wat Supply Sys	2:00	pm	1969-2000
	[redacted]	Vermilion Parish, Louisiana, Abbeville Sch Dist #2	11:00	am	1968-95
	1,500,000	Webber Co, Utah, Library	Noon		....

—

8, 11, 135

Alabama State Docks Dept. (Montgomery)
3 mil – Feb. 23, Senate approved – and sent to House
General Oblig to finance Piers + Dock
Facilities

La – Tangipahoa Parish, La. Nat.
Albany Sch Dist. No 3
116,000 – School bond elek, sched for
4/13

Francis I. Dupont has advertised for La. State
Bond + Bldg Comm for 3.30 + 3 1/2 % bonds

La –
Lafayette Parish, La – $2,500,000 – sealed
bids until 4/22 at 2 P.M. for purch of
Public Improvement Courthouse bonds.
Dated – 6/1/65 – Denom – 5,000 – Due
3/1/67 – 1995

Vermillion Par, La., Abbeville Sch. Dist
No 2 (Abbeyville) 1,125,000 – sealed
bids til 5/6 at 10 am for 19 1/3 years. School
coupon – bonds.

Miss Jackson - 6, mil - Bids given up to 3/23

Highway 31st Series Revenue (payble from gas + fuel taxes levied by State)

Paying Agent - State Treasurer, Cont. Ill Nat Bank + Trust, Chicago or Chem Bank NY Trust Co, NY.

Record of Last Important Sale

3 mil - Highway 30th Series Rev. Bonds sold 8/6/64 to a syndicate headed by F. S. Smithers + Co.

Other bidders -

Lehman Bros.

John Nuveen + Co + Ass.

Shields + Co.

Halsey, Stuart + Co.

Phelps, Fenn + Co.

Merrill, Lynch

Leland Speed + Co.

Municipals Sales

Atmore, Ala. Utilities Bd - 1,650,000
Refunding Wtr Gas + Sewer Revenue bonds
Sold to Syndicate managed by Francis
I. du Pont + Co. and Merrill, Lynch

La. State Bond + Bldg Baton Rouge
A consolidated acct headed by
Halsey, Stuart + Co., Inc. + F.S. Smithers +
Co. was successful bidder for the Public
Bldg, Series A A. Rev. bond of 15 mil

Miss -
Wash Co. - The Deposit Guaranty Bank
+ Trust Co., Jackson + Hamp Jones Co. were
the succ. bidders for the County Hospital
Bldg bond - 1 mil

Municipal Bds —

Tues, 4/6

Hernando, Miss — 730 — Special Street Improvement 140,000

Improv

4/7

St. Tammany Parish, La. 730 — Parish

Wide Sch. Dist. 1,995,000

4/12

Kenner, La 8 PM.

City Hall & Jail Improvement 200,000

Fire Dept Imp 50,000

Public Park 100,000

4/22

Lafayette Par, La.

Pub Impr. Courthouse 2,500,000

5/5

Lafayette Par, La. 2 PM

Consol School Dist, No 1 825,000

5/6

Vermilion Par, La, 10 AM —

Sch. Dist No 2 1,125,000

April 6, 1965

Facts pertaining to complaint filed in St. Tammany Parish school bond case:

1) Plaintiff is T.J. Smith, male Negro, domiciled in Parish of St. Tammany, registered voter, tax payer, and father of children attending St. Tammany schools

2) Defendants are: St. Tammany Parish School Board, a corporation
I.F. Parker, President of the School Board
William Pitcher, Superintendant of the School Board

3) Complaint is filed under:

28 U.S.C. § 1343 (3) and (4)
42 U.S.C. § 1981
" 1983
" 1985 (3)
" 1986
" 1988
28 U.S.C. § 1331
Fed. Rules of Civil Procedure 23 (a)(3)
" " " 65 (b)

4) Case No. 15463, filed in U.S. Federal Court for Eastern District of Louisiana, New Orleans Division

5) We maintain there are 21 white schools in St. Tammany Parish with 6551 white students in grades 1-8 and 2171 white students in grades 9-12, and 340 white teachers in all grades; there are 8 Negro schools with 2643 Negro students in grades 1-8 and 717 Negro students in grades 9-12 and 132 Negro teachers for all grades.

6) In essence we allege that the School Board has an affirmative obligation and duty under the Constitution and laws of the United States and the decisions thereunder to voluntarily desegregate such schools. That the failure of this school board or of any school board to do so is a denial of plaintiff's rights guaranteed under the due process and equal protection clauses of the 14th Amendment.

7) Under FACTS, NINTH, etc. (prayer for relief) we have asked that the School Board be enjoined from doing or having done by others any act that would further the proposed school bond issue, said temporary restraining order to remain in effect until it expires or until defendants file with the court a fair and equitable plan for desegregation of said school district and maintenance of said desegregated school district, which plan shall go into effect no later than the opening of the next school session.

8) We have asked for a temporary restraining order and in addition included an Order to Show Cause. This is returnable April 30th, when the School Board has to come in to show why the temporary restraining order should not be granted.

State Court

triple space?

TITLE

Plaintiffs complaining of the defendants etc, ~~xx~~ allege :

1. Plaintiffs ~~afe~~ are citizens of the United states and of the State of ~~South Car~~ Louisiana and ~~are etc.~~ reside ~~ext and are citizens of~~

2. Defendants are duly elected the ~~etc~~ (title) and ~~are responsible for the schools etc.~~ as part of their duties of their office are responsible for the supervision and direction of the schools in (County) (City) State?

3. The relief sought by the Plaintiffs herein is in their individual and representative ~~cap~~ capacities on behalf of all other Negroes citizens of the ~~U.S.~~ and of ~~S.Car~~ State of Louisiana who are residents of and are similarly situated (~~or however you phrase it in S.Car~~)

4. ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~

4. Upon information and belief the defendants in their capacities as (~~whatever~~ their official titles) have offered or are about to offer for ~~xxx~~ sale and/or distribution certain bonds and / or debentures or other ~~xxx~~ securities to the public in an amount of [illegible] million dollars which bonds are for the stated purpose (set forth stated purposes: construction of schools etc ~~and whatever else is involved~~), which bonds, debentures and/or securites bear the seal ~~x~~ and imprint of (fill in school board, or county or State of ~~So Car.~~)

5. That bonds have been authorized i n the following manner; as provided under the laws of the ~~State of S.Car~~. (if this is the fact)

6.That public announcements issued by or on behalf of the Defendants have stated that these bonds, debentures etc, and the proceeds therefrom will be used to construct erect maintain, retain and use schools and all buildings and appurtenances in connection therewith on a basis of separate and segregated schools for Caucasian persons and for Negro persons.

7. That up to and including the date hereof all schools under the authority of the defendants~~x~~ ~~of~~ or any of their predecessors in office, have

been maintained, operated and used on a basis of separate and segregated schools for Caucasian and for Negro persons.

8. That the maintenance, operation and use of schools as described above separating and segregating the students thereof by reason of their race or color, so that there are separate schools for Caucasian persons and for Negro persons, and the refusal to permit Caucasian persons to attend so-called Negro schools and the refusal to permit Negro persons to attend so-called Cau casian persons, and the very maintenance of such separate and segregated schools denies and is designed to deny plaintiffs herein and all other persons similarly situated equal protection of the laws guaranteed by the United States Constitution and more particularly the fourteenth amendment thereto and (clause of state Constitution, if any)

~~Louisiana~~ and accordingly

9. That ~~no~~ the law of the State of ~~South Carolina~~, ~~or~~ any law or ordinance of the ~~County~~ Parish of ~~Greenville~~ Tangipahoa, ~~the City of Greenville~~, or any school district or other subdivision thereof requires the separation and segregation of schools so that there are separate schools for Cau casian persons and for Negro persons. (If this is the fact; if it is not the fact then set forth the law and state it is unconstitutional under 14th Amend)

10. That at no time heretofore have the Defendants, or any of their predecessors in office, in their official capacity as described above, offered and/or put into effect a fair, equitable and reasonable plan to effectuate the desegregation of schools in existence or to be in existence under the jurisdiction and authority of defendants, and in fact it has been announced that the new schools to be built by the sale and distribution of the bonds etc, referred to above, will likewise be segregated.

11. That the bonds, debentures and other securities referred to previously herein, and the proceeds therefrom will be used for the continuance, and further maintenance and use of schools segreggated into separate schools for Caucasian and for Negro persons as previously herein, and that such maintenance, retention, construction and continued use on such a basis denies equal protection of the laws to the plaintiffs and all others similarly situated, as well as being unjust, unfair and inequiable.

12. That unless Defendants, their agents, servants, employees and all other persons acting on their behalf be enjoined, restrained and stayed from selling, offering for sale, distributing, or entering into agreements for the sale and distribution of, or issuing any bonds, debentures or other securities or other evidences of indebtedness ~~and/or pledging the credit of~~ bearing the seal, imprint or authority of the Defendants or any one acting ontheir behalf, and/for pledging the credit of such Defendants, the schools districts or districts of which the defendants are the (titles) -----------, the County of ~~Greenville~~, the City or ~~Gre[illegible]~~ , or any of their subdivisions, or of the State of ~~South Carolina~~, or any of its agencies, Departments or other bodies subject to its control, the plaintiffs, and all others similarly situated, will continue to be denied fair and equal treatment and will be denied equal protection of the laws as guaranteed by the United states Constitution

13. That the defendants or any persons acting on their behalf, or under their direction or instruction have no legal right or authority to, nor may they sell, offer for sale or distribute any bonds etc or pledge the credit of the said School Board, these defendants in their official capacity, the County of Greenville, the City of Greenville or thesubdivisions thereof, or of the State of South Carolin or any o f its constituted bodies for the purpose of conducting, constructing, maintaining and using schools on a segregated basis as more fully described herein, and in so acting defendants are acting beyond ~~their~~ The scope and authority of their office as well as in violation of the rights of the plaintiffs, and all others similarly situated as more fully described above.

14. That unless Defendants and all other persons acting on their behalf or under their instruction, as well as their servants, agents and employees are restrained, enjoined and prevented from selling, offering for sale and/or distributing and/or issuing such bonds, debentures, securities or other evidences of indebtedness to the public as more fully described above, the plaintiffs, and all others similarly situated, will suffer and continue to suffer great harm and indignities as citizens of the United States and o f the State of ~~South Carolina~~ and residents of -----, and will be

denied equal protection of the laws, and all other rights appertaining thereto, UNLESS Defendants at, or prior to, the date of the defendants' ~~to~~ answer this complaint prepare, file and serve with this count a fair equitable and reasonable plan for the desegregation of all schools under the authority and jurisdiction of these defendants, and for the maintenance of such schools without regard to the race, creed , color or national origin of the students therein.

15. No previous request for the relief sought herein has been previously made.

16. Plaintiffs have no adequate remedy at law.

WHEREFORE PLAINTIFFS demand Judgment ~~agagixx~~ agzinst Defendants as follows (1) ~~and~~ the Defendants, individually, and in their official capacity as the duly elected School Board (correct titles ~~or whate ver they are~~) and all persons acting in their behalf, or under their instruction or direction, their servants agents and employees, and all persons acting with knowledge of these presents be and the same are hereby enjoined, restrained, stayed and prevented from,

(a) Selling, offering for sale, entering into agreements f-or the sale and distribution of, issuing, having printed and ~~or~~ mailing any ~~any~~ bonds, debentures, securities or other evidences of indebtedness bearing the imprint, seal and/or authority of the Defendants in their official capacity as described herein, or of the ~~Greenville~~ School Board (?), the County of ~~Greenville~~, the City of Greenville, or many of their subdivisions, or school districts within their boundaries, ~~or thxxdk~~ or pledging the credit of any of the aforementioned, or of the State of ~~South Carolina~~,for the payment of such bonds, debentures, securities or other evidences of indebtedness designated as referred to above (here put in the official designation of these bonds, or describe them in particular) Or

(b) accepting and/or receiving any money or other thing of value for, or in return for, or in exchange for any such bond, debenture, security or other evidence of indebtedness, and

(c) and from erecting and or constructing, or letting out contracts for the construction or otherwise arranging for the construction of, or paying any fees , salaries wages or other earnings or other sums of money or things of value to be used for the construction and erection of any building and/or school, or any part thereof, or for the purchase of any books and supplies inconnection therewith, or the payment of any salaries and or wages or other earnings from sums received or to be received from the sale of any bonds, debentures, securities or other securities herein designated as ------------ ~~UNLESS~~ and

2, UNLESS ~~(d)~~ prior to or no later than the time for the filing of the answer of the Defendants herein to the complaint herein, the defendants, in their official capacity as ---------- submit to this court and to the plaintiffs a fair, reasonable and equitable plan for the prompt termination of segregation of all schools under the authority and jurisdiction of the defendants and/ or their successors in office by virtue of race, color, creed or national origin, and that such plan under the supervision of this court be put into effect immediately, and no later than the opening of school in September 196~~3~~4 and

3, ~~(e)~~ and that the Plaintiffs, individually and on behalf of all others similarly situated, have such other further and different relief as may effectuate the purposes of this complaint and as will seem just and proper to this court ;

JURISDICTION (to be the 4th allegation?

Jurisdiction is based on:

a.) U.S. Constitution, 14th amend §1:

"No state shall... deny

b.) 28 USC 1343 (3) which provides original jurisdiction in civil actions for state deprivation of rights, privileges, or immunities granted by U.S. Constitution.

(c) (i) ~~c.~~ 28 USC 2201 which provides for declaratory judgments

(ii) ~~d.~~) 28 USC 2202 which provides for further relief based on declaratory judgments

(iii) e.) 28 USC 2281 which prohibits the issuance of (temporary or interlocutory) injunctions except by a three-judge court

(d) ~~f.~~) 28 USC 2284 which provides for the convening of a three-judge court

(e) ~~g.~~) 42 USC 1983 which provides for actions against persons who under color of law subject citizens to deprivations of rights, ~~priv~~ privileges, or immunities granted by the US Const.

Complaint

Plaintiffs complaining of the Defendants, etc allege:

1. Ps are citizens of the U.S. and of the State of La, residing in Tangipahoa and/or St. Tammany Parish (T.).

2. ~~They~~ Ps are Negroes & seek relief in their individual & representative capacities on behalf of all Negro citizens of the U.S., ~~similarly~~ residents of T and similarly situated.

3. Ds are duly elected ____ ____ ____ ____ ____, responsible for the supervision & direction of the public school system(s) of T.

4. JURISDICTION

5. Upon information & belief, the Ds, in their official capacities have offered (are about to offer) certain bonds (and/or other securities), in the amount of $____, to the public for the stated purpose of ____, which securities bear the seal & imprint of ____.

6. Aforementioned ~~securities~~ bonds have been authorized, as provided by the laws of La, ____.

②

6. Public announcements issued by or on behalf of Ds have stated that these bonds & the proceeds therefrom will be used to (construct and/or maintain) the public school system of T.

7. The public school system of T is set up & maintained on an entirely segregated basis, with separate schools & facilities for Caucasian & for Negro persons

8. The La statute ______ (and/or provision of the La. Constitution ______) requiring such segregation is a violation of the equal protection clause of the 14th amendment, as interpreted in Brown v. Bd. of Ed..

9. The stated purpose of such bonds is to maintain (+ enlarge) such system.

10. At no time have Ds or their predecessors in office, in their official capacity, put into effect or attempted or offered to put into effect a fair + reasonable plan to effectuate the desegregation of such school system (and, in fact, it has been announced that the schools to be built ~~by~~ with the proceeds from these ~~securities~~ bonds will likewise be segregated.

11. The aforementioned bonds, whose proceeds will be used for the continuance of such school system deny equal protection of

the laws to Ps & others similarly ④ situated, as well as being unjust, unfair, & inequitable.

12 The Ds or any persons acting on their behalf have no legal authority to offer for sale or distribute any bonds or pledge the credit of the said school board for the purpose of maintaining (and/or constructing) schools on such segregated basis.

13. Unless Ds & any persons acting on their behalf be enjoined, restrained, & stayed from selling, distributing, or entering into any agreements to sell or distribute any such bonds & from pledging the credit of such Ds, the school districts, or

⑤

any of its subdivisions, agencies, or other bodies ~~subject~~ subject to its control, Ps & others similarly situated will continue to be denied fair & equal ~~treatment~~ & equal protection of the laws, as guaranteed by the 14th amendment & will suffer great harm & indignity as citizens of the US & of La. & residents of T, unless Ds, prior to filing an answer to this complaint, file & serve with this court a fair & equitable plan for the desegregation of the school system under their authority & for the maintenance of such schools without regard to race, creed, color or national origin [redacted]:

1) CO 5-8100
David Freeman
R. Bros Inc.
2) CI 7-3700
30 Rock → 3) CI 7-8135

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filed complaint
under 28 U.S.C. §1343, (3+4)
[redacted]

42 USC § 1981
" 1983
" 1985 (3)
" 1986
1988

4/6/65

Title 28 USC § 1331
Fed Rules Civ Proc Rule 23 (a)(3)
" 65 (b)

Plaintiff T. J. Smith
Defs 1) St Tammany Par. Sch B/
a corp
2) I. F. Parker, Pres
School B/
3) Wm. Pitcher Supt. Sch B/

p-f · sole Negro
dresil 2 pr
v St T—y.
neg Vo. tax
payer + Fa
v C al—
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[illegible]

[illegible]

Returnable
30th April

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

Case No. 15463
US Fed Court [illegible]
La. NO
[illegible]

Give Shirley Siegel facts:

1) Name of parties

2) $ 1,995,000 ~~St $ [illegible] Pr~~ ~~shud b/~~

3) Court + No

4) aply 1 rSu. Bw v th P// b ___ ul' + ut . shud b/ fls c pn v desegr.

5) statistics

6) jurisdictional [illegible] ?

7) will b h/ Apr. 30th

OK - done

Duplicated (w/ changes)

IN THE

UNITED STATES DISTRICT COURT

FOR THE

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

FILED
[illegible]
R.C. [illegible] CLERK
[illegible] Clerk

MRS. SYLVESTER SMITH, individually and on behalf of her minor children, Ida Elizabeth Smith, Ernestine Smith, Willie Louis Smith and Willie James Smith and on behalf of all other mothers of needy, dependent children similarly situated,

Plaintiffs,

- versus -

RUBEN K. KING, Commissioner of the State Department of Pensions and Security, State of Alabama; GEORGE WALLACE Chairman, State Board of Pensions and Security, State of Alabama; JAMES RECORD, MRS. MARY WAITE, WILLIAM M. CLARKE, TEMPLE COLEY, GRANT WHIDDON, MRS. MARY ELLA REAVES, Members of the State Board of Pensions and Security, State of Alabama; MRS. CLINTON S. WILKINSON SR., Director, Dallas County Department of Pensions and Security;

Individually and in their official capacities,

Defendants.

CIVIL ACTION
NO. 2495-N

COMPLAINT

(for declaratory judgment and injunctive relief)

I

1. This is a suit for injunctive relief authorized by Title 42 U.S.C. §1983 to be commenced by any citizen of the United States or other persons within the jurisdiction thereof to redress the deprivation under color of statute, ordinance,

regulation, custom or usage of the state of rights, privileges and immunities secured by the Constitution and the laws of the United States. The rights, privileges and immunities sought herein to be redressed are those secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, by the Social Security Act, 42 U.S.C. §§601-609, and by §601 of the Civil Rights Act of 1964. This is also a suit for a declaratory judgment pursuant to Title 28 U.S.C. §2201 of rights established by the aforementioned constitutional and statutory provisions.

2. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. 2281 since it seeks an injunction to restrain the Defendant officers of the State of Alabama from the enforcement, operation and execution of the state-wide regulation set forth in the Alabama Manual for Administration of Public Assistance, Part I, Chapter II, Section V(A), (entitled "Child Ineligible if There is a Father or Mother Substitute") and commonly referred to as the "substitute father" regulation (a copy of which is attached hereto as Exhibit A), on the ground of the unconstitutionality of said regulation under the Constitution of the United States.

3. Jurisdiction is conferred on this Court by 28 U.S.C. §1343 (3) and (4) providing for original jurisdiction of this Court in suits authorized by 42 U.S.C. §1983; jurisdiction is further conferred on this Court by 28 U.S.C. §§2201 and 2202 relating to declaratory judgments and by 28 U.S.C. §§2281 and 2284 providing for a three-judge Court.

4. Plaintiff Sylvester Smith is an adult Negro citizen of the United States and Alabama and is the mother of Plaintiff

children, Ida Elizabeth Smith, age fourteen years; Ernestine Smith, age twelve years; Willie Louis Smith, age eleven years; Willie James Smith, age nine years. For several years prior to October 1, 1966, Plaintiff and her children had been recipients of financial assistance under the Aid to Dependent Children program (hereafter referred to as ADC) of the State of Alabama, a public assistance program authorized by Code of Alabama, Title 49, §17 and Title 42 U.S.C. §§601-609. By notice dated October 11, 1966, Plaintiff Smith and her children were removed retroactive to September 30, 1966 from the list of persons eligible to receive aid, on the ground of the "substitute father" regulation. A copy of said notice is attached hereto as Exhibit B. A few weeks prior to her termination from ADC, Plaintiff Smith had sent a letter to President Johnson complaining of the inadequate size of her welfare grant and of other Alabama welfare policies. Through an aide, the President forwarded the letter to responsible welfare officials.

5. Plaintiffs bring this action on their behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The members of the class similarly situated are needy Negro mothers and dependent Negro children in the State of Alabama otherwise eligible for ADC in Alabama whose ADC financial assistance has been terminated or denied on the ground of the aforementioned "substitute father" regulation. The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties fairly and adequately protect the

interests of the class.

6. Defendant George Wallace is Chairman of the State Board of Pensions and Security and Defendants James Record, Mary Waite, William M. Clarke, Temple Coley, Grant Whiddon, and Mary Ella Reaves are the other members of said Board. Under Code of Alabama, Title 49, §17 (5a and 38) they are responsible, in conference with the Commissioner of the State Department of Pensions and Security, for the adoption of the policies, rules and regulations of the State Department of Pensions and Security, including the "substitute father" regulation here complained of.

Defendant Ruben K. King is Commissioner of the State Department of Pensions and Security and, as noted directly above, has statutory responsibility for the adoption of the regulations here complained of. Defendant King is also responsible, under Code of Alabama, Title 49, §17(5a and 37), for all executive and administrative duties of said State Department and for interpreting the regulation formulated by the State Board of Pensions and Security.

Defendant (Mrs.) Clinton S. Wilkinson Sr., Director of the Dallas County Department of Pensions and Security, is responsible, under the Terms of Code of Alabama, Title 49, §17 (9 and 39), for enforcing the regulations of the State Department of Pensions and Security in the County of Dallas.

7.(a) At all times hereafter mentioned, Defendants Wallace, Record, Clarke, Waite, Coley, Whiddon, Reaves and King (and their predecessors in office), in order to receive federal funds for the ADC program of the State of Alabama, have been required by the provisions of 42 U.S.C. §§601-609 to have formulated a "state plan" for ADC consistent with the provisions of the

Constitution of the United States and the provisions of 42 U.S.C. §601 et seq.

(b) Said Defendants are also, under the terms of Code of Alabama, Title 49, §17(7), required to "act as the agent of the federal government. . .in the administration of any federal funds granted to the state to aid in the furtherance of any of the functions of the state department. . .," and to otherwise act as the ~~agent~~ agents of the federal government in the furtherance of the objectives of the ADC program.

(c) Federal funds, granted under the provisions of 42 U.S.C. §601 et seq, constitute the major share of ADC grants in the state of Alabama .

(d) Under the terms of Code of Alabama, Title 49, Section 17 (14), defendants are required to grant ADC financial assistance

> "on behalf of any needy child who is a dependent as defined in the Federal Social Security Act or amendments thereto who shall comply with the applicable requirements of this chapter, and who: (a) Has not sufficient income and resources from all sources to provide a reasonable subsistence compatible with decency and health; (b) who meets any one of the following residence requirements -- (1) has resided within the state for one year immediately preceding the application for aid, or (2) was born within the state within one year immediately preceding the application for aid, or who parent or other near relative (as defined in the Federal Social Security Act) with whom the child is living has resided in the state for one year immediately preceding the birth of said child; (c) has not directly or indirectly disposed of or deprived himself of any property for the purpose of qualifying for the benefits of this chapter; and (d) is not receiving any other type of public assistance for which federal matching is available.

Under the terms of 42 U.S.C. §606 (a) a "dependent child" means:

> "a needy child (1) who has been deprived of parental support or care by reason of the

> death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, its equivalent, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

8.(a) In all respects, except for the "substitute father" regulation promulgated and enforced by Defendants, Plaintiffs and the members of their class are eligible for and entitled to ADC financial assistance.

(b) Plaintiff children Ida, Ernestine and Willie Louis, have not received parental support or care from their father, who has been dead since 1955. Plaintiff child Willie James has not received parental support or care from his father, who has been continuously absent for many years. All the children are living in the home of their mother, Plaintiff Sylvester

Smith, and all are under the age of eighteen, are Alabama residents for more than one year, are not receiving any other type of public assistance, and have not directly or indirectly disposed of property for the purpose of qualifying for ADC assistance. The sole income of Plaintiff Smith and her children is in the sum of sixteen dollars ($16) per week paid to Plaintiff Smith for working as a waitress six days a week from 3:00 a.m. to 12:30 p.m. Said income is below the financial standards promulgated by Defendants as necessary for a subsistence compatible with decency and health.

Not on
The
need
standard

9.(a) According to information given to Plaintiff Smith by one Mrs. Stancil, an employee agent of Defendants and "counselor" of Defendants for Plaintiff Smith, the "substitute father" of the Smith children is one Mr. Willie E. Williams. Plaintiff Smith was told by Mrs. Stancil on or about October 11, 1966, that she and her children were no longer eligible for ADC aid because Mr. Williams was the "substitute father" and that Mrs. Smith should look to Mr. Williams for support. Thereafter, by notice dated October 11, 1966 and signed by Defendant Wilkinson, Plaintiffs' ADC aid was terminated on the ground of the "substitute father" regulation. (See Exhibit B attached hereto.)

(b) Mr. Willie E. Williams has nine children of his own; he lives with his family, including his wife and eight of their nine children who are dependent upon him for support. He earns barely enough for the support of his own children through work as a heavy laborer. Mr. Williams is not now, nor was he at the time of the termination of Plaintiff Smith's ADC benefits, willing or able to support the Smith family. Mr. Williams is the father of none of the children of Plaintiff Smith.

(c) Mr. Williams has known Plaintiff Smith virtually all of her life; in the last five years, he has visited her home with some frequency. He does not live in her home. Plaintiff Sylvester Smith is not willing to discuss whether she engages in a sexual relationship with Mr. Williams.

10. Upon information and belief, the Defendants have applied their "substitute parent" regulations so as to disqualify from ADC benefits only or virtually only Negro mothers and children and not white mothers and children.

11. By promulgating, adopting and enforcing the "substitute father" regulation, and on ground of said regulation terminating and denying ADC financial assistance to Plaintiff Smith, her minor children, and all other members of her class, Defendants acting under color of State law, have unlawfully deprived Plaintiff Smith and the other members of her class of ADC financial assistance, and their constitutional rights to equal protection and due process of law, and their rights under 42 U.S.C.§§601-609 and Code of Alabama, Title 49, §17, in the following manner;

A. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of the equal protection of the ADC law by classifying them as ineligible for ADC on a thoroughly arbitrary and irrational basis, i.e., the alleged sexual relation of their mother with a man who is not their father, who owes no duty of support, is giving no support, who is not married to their mother and who is not living with them.

B. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of due process of law in that Defendants have denied them needed ADC benefits to which they are otherwise entitled by arbitrarily imposing the label "substitute father" on persons who are not their fathers, owe no duty of fatherhood to them, and are performing no duty of fathers to them.

C. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of due process of law in that Defendants have denied them needed ADC benefits on the basis of a vague and uncertain regulation which enables Defendants to pick and choose, on an arbitrary and whimsical basis, those to whom ADC benefits shall be granted. The vagueness of the regulation permits Defendants to terminate aid, if they choose, in the event a recipient complains to federal authorities of their other policies, as Plaintiff Smith did.

D. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated of the equal protection of the laws in that the Defendants have applied the "substitute father" regulation in such a manner as to disqualify Negro applicants and recipients but not white applicants and recipients.

E. Defendants have deprived Plaintiff Smith and other mothers similarly situated of their right to privacy under the due process clause of the Fourteenth Amendment by, inter alia, placing upon Plaintiff Smith and other mothers, under the terms of the "substitute father" regulation, the burden of proving that they are not engaging in a sexual relation with a man through such means as "references" from their "ministers, neighbors, grocers".

F. Defendants, through the "substitute father" regulation, have deprived the needy dependent children of Plaintiff Smith and other mothers similarly situated of the ADC benefits to which they are clearly entitled under the express provisions of 42 U.S.C.§§601-609 and Code of Alabama, Title 49, §17.

12. Plaintiffs and the class which they represent have suffered damage to their health and well-being, the health and well-being of their children and their family life, and will continue to suffer severe and irreparable injury because of the aforesaid regulation complained of herein until said regulation is declared illegal and unconstitutional and is enjoined by this Court. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

WHEREFORE, plaintiffs on behalf of themselves and all others similarly situated respectfully pray:

1. That a three-judge Court be convened to determine this controversy pursuant to 28 U.S.C. §2281;

2. That this Court enter a declaratory judgment pursuant to 28 U.S.C. §2201, declaring "the substitute father" regulation of the Alabama State Board of Pensions and Security, specifically Part I, Chapter II, Sub-division V(A) of the Alabama Manual of Public Assistance Administration, void and of no effect insofar as it denies eligibility to Plaintiffs and members of their class on the ground that they have a "substitute father" as therein defined; and further declaring that said regulation is contrary to the intent of Congress in enacting the Aid for Families of Dependent Children provisions of the Social Security Act (42 U.S.C. §§601-609) and the intent of the legislature of Alabama in enacting the Aid to Dependent Children program in the Code of Alabama, Title 49, Section 17; and further declaring that said regulation is repugnant to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States; and further declaring that Defendants are required to consider the eligibility for Aid to Dependent Children of Plaintiffs and all others similarly situated without reference to said "substitute father" regulation.

3. That this Court enter a permanent injunction restraining each defendant, their successors in office, agents and employees from enforcing the "substitute father" regulation contained in Part I, Chapter 2, Sub-division V(A) of the Manual of Public Assistance Administration, and ordering them to consider eligibility for Aid to Dependent Children of Plaintiffs and all others

similarly situated without regard to said regulation, on the ground that said regulation violates the intent of Congress in enacting the Aid to Dependant Children program contained in 42 U.S.C. §§601-609, in intent of the legislature of Alabama in enacting Title 49, §17 of the Code of Alabama, and on the ground that said regulation is repugnant to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

4. That pending the final determination by this Court of this suit, this Court enter a preliminary injunction restoring Plaintiff Smith and her minor children to the Aid to Dependant Children program of the State of Alabama and restraining Defendants from denying eligibility to all others similarly situated on the ground of the aforesaid "substitute father" regulation.

5. That this Court allow Plaintiffs their costs herein and grant them and all others similarly situated such further, other, additional or alternative relief as may appear to this Court just and appropriate.

Respectfully submitted,

DONALD A. JELINEK
Lawyers Constitutional Defense Committee
31 1/2 Franklin Street
Selma, Alabama 36701

ALVIN J. BRONSTEIN
Lawyers Constitutional Defense Committee
603 North Farish Street
Jackson, Mississippi 39202

Attorneys for Plaintiffs

EDWARD V. SPARER
HOWARD THORKELSON
409 West 117th Street
New York, New York 10027

Of Counsel

Exhibit A - The "Substitute Father" Regulation

Pt. I, Ch. II, Subd. V(A) of the Alabama Manual of Public Assistance Administration:

V. Child Ineligible if There Is a Father or Mother Substitute

A. Father Substitute: An able-bodied man, married or single, is considered a substitute father of all the children of the applicant/recipient mother living in her home, whether they are his or not, if: (1) he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation; or (2) though not living in the home regularly, he visits frequently for the purpose of cohabiting with the child's natural or adoptive mother; or (3) he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere. Pregnancy or a baby six months or under is prima facie evidence of a substitute father as indicated above.

When there appears to be a substitute father, disapprove an application or terminate aid unless the mother establishes that one of the following situations exists: (1) she and/or the substitute father meets the criteria of disability as described under "Physical or Mental Incapacity"; (2) the substitute father is no longer living in the home or visiting the home for the purpose of cohabiting with her; or (3) the relationship is broken between the mother and a man who has not been living in the home or frequenting the home.

still together
not seeing
not sleeping

Evidence showing that the relationship has been discontinued includes proof such as: the father has married another woman; or he is in a public institution; or, if he has been living in the home, he is now living at another address; or a notarized statement by the mother and substitute father that they have discontinued their relationship. This evidence must be corroborated by at least two acceptable references in a position to know. Examples of acceptable references are: law-enforcement officials; ministers; neighbors; grocers. If needed, the mother will be given 30 days to present her evidence before her application is disapproved or her case closed unless additional time is needed. If additional time is needed, another 30 days may be allowed. In no instance shall more than 60 days be allowed. Although the burden of proof rests with the mother, the worker will assist in any way possible to help the mother establish that she has broken a relationship. Also, before rejecting an application or closing a case, the worker will talk with the mother about reasons for the agency's action and about her right to reapply at any time that she does break the relationship. If the family is otherwise eligible, the case should be recertified for aid immediately.

* * * * *

Exhibit B

PSD-43 Revised 10-1-59

Dallas COUNTY DEPARTMENT OF PENSIONS AND SECURITY

Selma, ALABAMA

TERMINATION OF AWARD

Name: Sylvester Smith

C. N.: 22,929

Address: 1544 Curtain Street
Selma, Alabama

Program: ADC

You have been removed from the list of persons eligible to receive aid effective September 30, 19 66 because:

Substitute father policy.

If you want other information from the county department, we shall be glad to talk with you.

APPROVED:

10-11-66
(Date)

, Director

VERIFICATION

STATE OF ALABAMA

COUNTY OF DALLAS

I, SYLVESTER SMITH, of lawful age, first duly sworn upon oath, depose and say:

That I am the Plaintiff in the action herein;

That I have read the annexed Complaint and know the contents thereof; and

That the matters set out in said Complaint are true and correct as therein stated to the best of my knowledge, information and belief.

Sylvester Smith
SYLVESTER SMITH
1544 Curtis Street
Selma, Alabama

Sworn to and subscribed before me
this 2nd day of November, 1966.

James C. Kimbrough
Notary Public

My Commission expires: March 3, 1968

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

OFFICE OF THE ADMINISTRATOR

June 21, 1968

TO: STATE ADMINISTRATORS

SUBJECT: Supreme Court Decision on Substitute Parent in AFDC

On June 17, 1968, the U. S. Supreme Court issued a decision (copy attached) in the case of King vs. Smith which deals with the issue of State policies making ineligible for AFDC certain children on the ground that they are not deprived of parental support or care. This decision will have applicability to the States which include in their plans "substitute parent" or "man-in-the-home" policies.

Under the court decision, eligibility of children for AFDC because of deprivation of parental support can only be determined in relation to a child's natural or adoptive parent, or a stepparent who is legally obligated to support the child. This does not mean that there is any change in the requirement that all children must meet the test of need as defined in the State plan. The State's policies with respect to establishing the need of applicants or recipients and the amount of the assistance payment must be consistent with the Federal policy regarding the consideration and application of income and the Federal policy concerning assumed income.

Attached is a copy of a regulation in tentative form, which has been signed by the Administrator and approved by the Secretary, for publication in the Federal Register. When the regulation is officially promulgated after the expiration of the 30-day notice, it will be immediately effective. Accordingly, all States who are affected by the decision are asked to start planning for the necessary revisions of their State plans so that amendments can be submitted for consideration without delay.

Our Regional Office staff will be available to work with you in the preparation of the necessary revisions.

Mary E Switzer
Administrator

Enclosures

Box 455
Woodstock, New York
July 26,1968

Carl Rachlin, Esq.
S.E.D.F.
164 Madison, Avenue
New York, N.Y. 10016

Dear Carl:

Before putting in time on Georgia v. Cohen, let me get in a few quick remarks on the South Carolina case - or running the risk of forgetting about it.

With regard to paragraph 14, why not take plaintiffs about whom you can simply assert that there is no common law marriage -- and avoid the uncertainty raised by the present form of allegation. If you want, you can then add a due process argument, alleging another defect in the regulation, in that -- at least as applied -- it places an unreasonable burden of proof on the class of people affected, requiring them to prove that there is no common-law-marriage despite their assertions that they did not intend to live as man and wife, were not legally free to contract marriage etc. and no compelling proof to the contrary was offered prior to rejecting their application or termination aid.

More importantly, I do not see how you can try to force the constitutional issue at this time by ignoring the statutory. This is an AFDC program that is involved, which does receive federal funds, and no matter how quiet you are on the issue, these facts will quickly become known to the court. King v. Smith does control the case and the court is not going to deliberately ignore it. I strongly urge you to include the statutory allegations. Otherwise, I think you will simply lower your standing and credibility with the court. It also looks poor from the client viewpoint.

In my opinion, its best to keep the maximum grant issue for cases separate from the eligibility issue, but I make no claim to being expert on federal pleading practice.

Best regards,

Ed

Edward V. Sparer

P.S. I am sure George has sent you a copy of the HEW regulation which was published for purposes of notice on JULY 20. Unless HEW is retreating (which is possible to be sure), the notice should be publiched and effective within a ouple of days. You will notice that the draft regulation requires that "parents" other than natural or adoptive must be ceremonially married before the children can be found eligible. This regulation, of course goes much further than we could under the usual statutory or constitutional arguments.

As to the residency issue, my opinion on that is the same as on maximum grants. I would guess by the way, that you will have to search hard for residency plaintiffs (maybe not?)

South Carolina :

I Send Welfare Rights Organization a copy of the second draft.

II Contacts :

a) generally Fred [redacted] LeClercq
Emory

B) Consultant to: Penn Community Services, St. Helena Island,
Frogmoore, S.C. 29920

c) Beaufort County Welfare Rights Committee
Mrs. Geneva White
Route 1
Box 193
Frogmoore, S.C. 29920

D) Blanche Webber
Box 531
Allendale, S.C.

Mr. Sparer,

1) Please note that paragraph 12 of the complaint is tied to sec 601 of the Civil Rights Act of 1964 (cited in paragraph 1) , and that these two could be dropped without, as far as I can see, affecting the rest of the complaint.

2) We need some information still, and if you have it, perhaps you could send us the figure of the maximum income allowable in the South Carolina ADC program? paragraph 10-e of the complaint.

Chick Schoen

L

1. This is a suit for injunctive relief authorized by Title 42, USCA, SEC. 1983 to be commenced by any citizen of the United States or other persons within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of the state of rights, privileges and immunities secured by the Constitution and the laws of the United States. The rights, privileges and immunities sought herein to be redressed are, those secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, ~~by the Social Security Act, 42 USC, sec 601-609~~, and by sec 601 of the Civil Rights Act of 1964. This is also a suit for a declaratory judgement pursuant to Title 28, USC, sec 2201 of rights established by the aforementioned constitutional and statutory provisions.

?
6

2. This is a proper case for determination by a three-judge court pursuant to 28 USC 2281 since it seeks an injunction to restrain the Defendant officers of the State of ~~Alabama~~ S. Carol. from the enforcemant, operation and execution of the state-wide regulation set forth in the Policies and Prodcdures in Public Assistance, published by the South Carolina Department of Public Welfare, Volume IV, Chapter # 2, Sec. C, 2, d., (1),(d), on the ground of the unconstitutionality of said regulation under the Constitution of the United States.

3. Jurisdiction is conferred on this Court by 28 USC 1343 (3) and(4) providing for original jurisdiction of this Court in suits authorized by 42 USC sec. 1983; jurisdiction is further conferred on this Court by 28 USC secs, 2201 and 2202 relating to declaratory judgements and by 28USC sec 2281 and 2284 providing for a three-judge Court.

4. Plaintiff.... has been denied assistance provided for citizens of South Carolina under the Code of Laws of South Carolina sec, 71-11, and Title 42 USC secs. 601-609.... on the basis of the "common law relationship" regulation.

5. Parties bring this action on their behalf aand on behalf of all the other persons similarly situated pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure. [illegible] members of the class similarly situated are needy mothers and dependent [illegible]

2

State of South Carolina otherwise eligible for ADC in South Carolina whose ADC financil assistance has been terminated or denied on the ground of the aforementioned "common law relationship" regulation. The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical ot the claims of the class; and the representative [redacted] parties fairly and adequately protect the interests of the class; and the State of South Carolina had acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief [redacted], [redacted] with respect to the class as a whole.

6.Defendants....

South Carolina Board of Public Welfare under whom the State Department of Public Welfare operates , Code of Laws of South Carolina sec. 71-1, and who appoints the State Director of Public Welfare.

State Director of Public Welfare who executes the decisions and carries out the policies of the Board and who sees that the laws relating to the activities and responsibilities of the Board are obeyed, and who is the administrative head of the State Department of Public Welfare. Code of Laws of South Carolina sec, 71-5. The state Department of Public Welfare is authorized to:

> 1) supervise and administer the public welfare activities and funcitons of the state, and
> 2) adopt all necessary rules and regulations and formulate policies and methods of administration, when not otherwise fixed by law

3......... County Board of Public Welfare- which acts as the representattive of the State in admininstering welfare activities within its jurisdiction. CLSC sec. 71-36

.... County Director- chief executive officer of the county board welfare organization performing those duties assigned to him by the county board, the State Department, or law. CLSC sec. 71-34.

~~7. (a) .... (the state-level officers) have been required under 42 USC sec. 601-609 to make a state plan of welfare assistance conforming to the Constitution and to the provisions of 42USC secs. 601 et seq.~~

~~(b) under sec. 71-32 the State Department is to cooperate with any federal [illegible] purpose of carrying out matters of mutual concern and to administer any [illegible]~~

7a)Under section 71-95 of the Code of Laws of South Carolina, the county department is directed to grant aid to the families in South Carolina with "dependent children."

b) Section 71-91 of the Code of Laws of South Carolina defines "dependent child" as one under the age of eighteen years who has been deprived of parental support of care by reason of the death, continued absence from home or physical or mental incapacity of a parent and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or neice in a place of residence maintained by one or more of such relatives as his or their own home and who, if not granted aid, is likely to become a public charge or who would otherwise be deprived of proper support, care or training or a child under the age of twenty-one who is attending high school or college or regularly attending a course of vocational or technical training.

8.a) The South Carolina manual entitled Policies and Procedures in Public Assistance defines a parent, for the purpose of determining eligibility for Aid to Dependent Children benefits as:

1) The legal father or mother; i.e. the parents are legally married, including recognized common-law marriage; and adoptive parents....

2) A man who is living in common-law relationship with a woman and residing in the home with her, whether or not they are legally married by license. (The common law relationship would set up a stepparent relationship wo children not his own.))

Policies and Procedures in Public Assistance, South Carolina Department of Public Welfare, Vol. IV, Ch.2, sec. C, 2, d., (1), a) and d).

b) The manual explains the term "common law relationship" as ~~encompassing~~ including the situation where a man and a woman are living together, whether or not the man is married to another woman. ~~And~~ While recognising that their position was not in ~~full~~ accord with the law of South Carolina, Defendants have promulgated and enforced the general policy that, for purposes of welfare eligibility, cohabitation ~~would~~ is to be considered ~~as having the same~~ ~~effect as~~ common-law marriage ~~in placing~~ and is to place a duty on the man to support the woman and her children. Vol IV, sec. C, 2, d., (2), (b), 9 Common-Law Relationship

9. The pertinent sections of South Carolina law defining the responsibility to support and common-law marrigge are:

a) Section 20-303 of the Code of Laws of South Carolina which declares that any man who is capable of working is obliged to suppost his wife, his minor unmarried legitimate or illegitimate child or children dependent on him for support.

b) Section 15-1231, the stepparent of a child is obliged to support that child provided that he knew that the child existed at the time of his marrigge.

c) Section 20-6 of the Code of Laws of South Carolina which declares that parties to a marriage must be free to contract marriage; otherwise the marriage is bigamous and void.

d) Tedder v. Tedder, 108 S.C. 271, 94 S.E. 19 (1917), which holds that parties to a common-law marrigge must intend to be living as man and wife ~~at the time of their~~ cohabitation [redacted].

10 ~~13.~~ In all respects, but ~~Under all respects~~, ~~except~~ for the "common law relationship" regulation, [redacted] promulgated and enforced by Defendants, Plaintiffs[redacted] and the members of ~~her~~ their class qualify for and are entitled to Aid to Dependent Children benfits.

a) one parent (legal) absent
b) all in the home of a relative
c) all under 18 or in school
d) all have lived in the state for over a year
e) remaining relatives income is under the standard promulgated by Defendants as necessary for a subsistence compatible with decency and health.

11 ~~12.~~ According to information given to Plaintiff[redacted] by [redacted] of the State Dept. of Welfare, the common-law relationship involves herself and one [redacted]. Plaintiff was told that she and her children were no longer eligible for Aid to Dependent Children benefits, and that on the basis of this "common-law relationship" Plaintiff ~~has~~ to look to Mr. [redacted] for support for herself and for her children, none of whom are the children of Mr. [redacted].

14. Mr. [redacted] is ~~or~~ not ~~may~~ responsible at law for the support of Plaintiffs because ~~until~~ ~~it can be proven that~~ he and Plaintiff [redacted] have ~~entered a common-law marriage~~ ~~recognized by law~~. not agreed to live as man & wife.

? 12 ~~15.~~ Upon information and belief, the Defendants have applied their "common law relationship" regulation so as to disqualify from Aid to Dependent Children benefits only or virtually only Negro mothers and children and not white mothers and children.

This in reference to §601 of C.R.A. of 1964

13 ~~16.~~ By promulgating, adopting and enforcing the "common-law relationship" regulation, and on ground of said regulation terminating and denying Aid to Dependent Children financial assistance to Plaintiffs and [redacted] all other members of her class, Defendants , acting under the [redacted] color of [redacted] State Law, have unlawfully deprived Plaintiffs [redacted] and the other members of her class of ADC financial assistance, by denying them their [redacted] constitutional rights to equal protection and due process of the law, [redacted] contrary to the provisions of 42 United States Code sec. 1983.

[redacted]

A. Defendants have denied the Plaintiffs and all others similarly situated ~~of~~ the due process of the law by denying them access to the courts and the controlling law of South Carolina in the determination of their marital status, with the intent, or with the result that Plaintiffs and all others similarly situated will be removed from or barred from the financial assistance available under Federal and South Carolina statutes, and otherwise due them.

B. Defendants have denied the Plaintiffs and all others similarly situated ~~of~~ the equal protection of the laws by acting under color of South Carolina law to create a definition of common-law marriage applicable only to recipients of Aid to Dependent Children and to applicants ~~of~~ for such aid, which definition prejudiced the rights of said recipients and applicants to the benefits otherwise due them.

14. Mr. [redacted] is not responsible at law for the support of Plaintiff's because he and Plaintiff [redacted] have not agreed to live as man and wife.

15. In King v. Smith, No. 949, Oct. term (1967), the Supreme Court of the United States construed 42 USC sec. 606, to which all state Aid to Dependent Children programs must conform if the state is to receive federal grants, 42 USC 601-609, to restrict the definition of "parent" ~~only~~ to those legally ~~responsible~~ liable for the care and support of the child.

b) Federal funds under 42 USC 601 et seq. make up a major share of ADC grants in South Carolina, and so South Carolina is bound by the authoritative construction of the federal statute.

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funds granted the State for the Aid to Dependent Children program. It is further [illegible] directed to take action from time to time, within the limits of South Carolina law, to secure for the State all possible Federal aid, CLSC sec. 71-12.

(c) Federal funds under 42 USC secs. 601 et seq. make up a major share of ADC grant in South Carolina.

(d) Under CLSC sec. 71-92 defendants are required to administer [illegible] all funds made available or appropriated for ADC grants by the Federal government. CLSC defines "dependent child" in th same terms as the federal statute at 42 USC sec. 606:

> a child under the age of eighteen years who has been deprived of parental support or care by reason of the death, continued absence from home or physical or mental incapacity of a parent and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or neice in a place of residence maintained by one or more of such relatives as his or their own home and who, if not granted aid, is likely to become a public charge or who would otherwise be deprived of proper support, care or training o a child under the age of twinty-one years who is attending high school or college or regularly attending a course of vocational or technical training; [illegible] ....
> [illegible] CLSC sec. 71-91.

(e) Under CLSC sec. 71-95 the county department, as the agency of the State Department of Public Welfare, is directed to grant aid to such child:

> If ...(the dependant child) is found to be in need and to have resided in the State for one year immediately preceding the application for such aid or to have bee born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one yeat immedialely preceding the birth of such child, the county department shall grant such aid as may be necessary for the support of such child in its own home or in the home of one of its relative as set forth in this chapter, in a manner compatible with decency and health.

(f) In King v. Smith, No. 949, Oct. term (1967), the Supreme Court construed 42 USC sec. 606, to which all state welfare plans must conform [illegible] if the state is to receive federal grants, 42 USC 601-609, to include in its definintion of parent only those legally respnsible for the well-being of the child. Any other persons [illegible] in the home cannot [illegible] affect the families eligibility for welfare payments.

8. In all respects, except for the [illegible] " common law relationship" regulation promulgated and enforced by Defendants., Plaintiffs and the members of their are eligible for and entitled to Adc financila assistance.

a) one parent absent
b) all in the home of a relative
c) all under 18 or in school
d) all have lived in the state for over a year
e) remianing relatives income is under the standardpromulgated by Defendants as necessary fo a subsistence compatible with decency and health.

9. According to information given to plaintiff, ********* by ************** the
"common law relationship" involves herself and one ************* . Plaintiff
was told that she and her children were no longer eligible for ADC aid because Mr.
[redacted] had entered such a relationship with her, and that she and her family
should look to Mr. ********* for support. Aid to plaintiff ********** was subsequently
terminated.

b) Mr.********** is married, etc. is ~~not~~ bound by South Carolina family law to
support his wife and his minor unmarried child or children dependent on him* and
no others. [illegible] CLSC sec. 20-303.
* legitimate or illegitimate.

c) Plaintiffs ********************, are not the children of Mr, **************.

d) Neither Mr.*******, nor Plaintiff ******* intend their relationship to be
that of man and wife as is required if such relationship is to be recognized as a
common law marriage in South Carolina.

10. Upon information and belief, the Defendants have applied their " common law
relationship" regulations so as to disqualify from ADC benefits only or virtually
only Negro mothers and children and not white mothers and children.

11. By promulgating, adopting and enforcing the "[redacted] common law relations"
regulation, and on ground of said regulation terminating and denying ADC financial assistance
to P;aintiff*********, her minor children, and all other members of her class, Defendants
acting under color of State law , have unlawfully deprived Plaintiff(******* and the other
members of her class of ADC financial assistance, and their constututional rights to
equal protection and due process of the law, and their fights under 42 USC secs. 601-609
and Code of Laws of South Carolina sec.71-11., in the following manner:

A. Denial of [illegible] equal protection of the laws by illegally, unconstitutionally + arbitrarily deciding to ignore the
applicable provisions of South Carolina law in determining whether [illegible] a common
law marriage, and hence a duty of support, exists between [illegible] Plaintiff******
and Mr. *********.

B. denial of due process of law in that Defendants have denied ~~them~~ Plaintiffs neededABC benefits
to which they are otherwise entitled by arbitrarily imposing the label of
"common law husband, and stepparent" on persons who are not their fathers,
or husbands, who owe them no duty of support, and have not accepted any such duty.

3

~~7. Under 42 United States Code sec. 606, the termkkkkkkkkkkkkkkjjjjjjjjjjjjjjjjjjjjjjjjj~~

7. Under section 71-95 of the Code of Laws of South Carolina, the county department is directed to grant aid to the families in South Carolina with "dependent children."

Glen

b) Section 71-91 of the Code of Laws of South Carolina defines "dependent child" as one under the age of eighteen years who has been deprived of parental support or care by reason of the death, continued absence from home or physical or mental incapacity of a parent and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or neice in a place of residence maintained by one or more of such relatives as his or their own home and who, if not granted aid, is likely to become a public charge or who would otherwise be deprived of proper support, care or training ot a child under the age of twenty-one who is attending high school or college or regularly attending a course of vocational or technical training.

8, There are two sections of the Code of Laws of South Carolina which define the extent of "parental support;"
a) Under section 20-303, any man who is capable of working is obliged to support his wife, his minor unmarried legitimate or illegitimate child or children dependent on him for support.
b) Under section 15-1231, the stepparent of a child is obliged to support that child provided that he knew that the child existed at the time of his marriage.

handbook #

9. The South Carolina handbook entitled Policies and Procedures in Public Assistance defines a parent, for the purpose of determining eligibility for aid to dependent children benefits as:
a) The legal father or mother; i.e., the parents are legally married, including recognised common-law marriage; and adoptive parents....
d) A man who is living in common-law relationship with a woman and residing in the home with her, whether or not they are legally married by license. (The common law relationship would set up a stepparent relationship to children not his own.)
Policies and Procedures in Public assistance, South Carolina Department of Public Welfare Vol. IV, Ch. 2, sec.C, 2, d., (1).

10. Under South Carolina law, there are several elements necessary for the existence of a common-law marriage; and hence for the existence of a duty to support:
a) the parties must be freed to contract marriage, otherwise the marriage is bigamous and void. Code of Laws of South Carolina sec. 20-6.
b) the parties must intend to be living as man and wife. Tedder v. Tedder, 108 S.C.271, 94 S.E.19 (1917).

handbook

11. The South Carolina handbook, Policies and Procedures in Public Assistance, explains the term "common law relationship" as encompassing the situation where a man and a woman are living together, whether or not the man is married to another woman. And, while recognising that there are "certain other stipulations" in the law of common-law marriage to be met before cohabitation will be legally recognised as a marriage, the State Department of Welfare has adopted the more simple policy of considering cohabitation as common-law marriage. Policies and Procedures in Public Assistance, Vol. IV, sec. C, 2, d., (2), (b), Common-Law Relationship

denial of due process of ~~equal protection of~~ the laws ::

Defendants have denied the Plaintiffs and all others similarly situated of the due process ~~equal protection~~ of the laws ~~by~~ by denying them access to the courts and to the controlling law of South Carolina in the determination of their marital status, with the intent, or with the result that Plaintiffs and all others similably situatedwill be removed from or barred from the financial assistance available to them + otherwise due them under the Federal Social Security statutes, and the corresponding South Carolina statutes.

denial of equal protection of the laws::

Defendants have denied the Plaintiffs and all others similarly situated of the euqal protection of the laws by acting under color of South Carolina law to creating a definition of common-law marriage applicable only to recipients of Aid to Dependent Children benefits, which definition prejudiced the rights of said recipients to the benefits otherwise due them.

4|57 $14
[redacted] 52)3000
260
400

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net income measured against agency's need requirement.

When need has been established and other eligibility requirements are satisfied, public assistance attempts to supplement available resources to the extent necessary to meet the need. (See Chapter III, Establishing Need and Determining Payments.)

included in budget with $0 workers deduction

d. Deprivation of Parental Support

In order to be eligible for aid to dependent children a child must be deprived of the support or care of one or both parents. Children are usually deprived of support or care because of death, desertion, continued absence from the home for other reasons, or physical or mental incapacity of a parent. Although in a measure a child is always deprived by the loss of a parent, it does not necessarily follow that such a child will always be eligible for public assistance, since other factors may compensate for the loss. The following definitions and policies are given for the determination of deprivation of parental support.

(1) Definition of a Parent

For the purpose of determining eligibility for aid to dependent children, a parent is defined as follows:

(a) The legal father or mother; i.e., the parents are legally married, including recognized common-law marriage; and adoptive parents.

(b) The stepfather or stepmother. (In counties where they are legally responsible and in other counties when living in the home.) Step-fathers will be held responsible as long as they are living with the stepchildren. However, if the stepfather deserts or is permanently disabled or incarcerated for several years, it will be necessary that efforts be made to secure support from the natural father. In instances where the stepfather is only temporarily disabled or incarcerated a short period of time, it will not be necessary to try to get support from the natural father.

(c) The natural father (where parenthood is established).

(d) A man who is living in common-law relationship with a woman and residing in the home with her, whether or not they are legally married by license. (The common-law relationship would set up a stepparent relationship to children not his own.)

Policies + Procedures in Public Assist
S.C. Dept of Pub Wel
Ch.I, Sec. C, 2, d.

(d)—

(2) Major Factors Causing Deprivation

(a) Death - the death of one parent, in a sense, always deprives a child, certainly emotionally, but deprivation to the extent that public assistance is needed does not automatically follow the death of a parent. Death of the father is more likely to bring about a need for financial support than death of the mother because of the fact that the father is the normal wage earner. However, in some instances where the mother dies the father is not able to provide normal care for his children because of his inability to pay someone to care for them while he is out of the home working. Aid to dependent children may be the answer to such a problem, but experience has shown that more often than not the father is able to make arrangements for the personal care of his children.

Death of the father frequently deprives a child of financial support because the mother's normal place is in the home. She must either stay in the home or secure work and provide personal care of her children in some other way.

In determining whether a mother should be expected to work, the decision must be made according to the circumstances in each individual family. The worker should assess the mother's motivation to work, the child's physical and emotional needs for the mother, whether satisfactory arrangements can be made for substitute care for the child, the availability of work the mother is physically able and fitted to do, and whether the net income she would receive after allowable expenses are deducted would justify her leaving the children. In planning it should be recognized that the infant and the child up to 3 years of age require a more constant kind of care from the mothering person than do older children.

Failure on the part of a mother to accept employment will not be sufficient grounds for denial of assistance even though it may seem advisable that she secure employment.

Where the mother does accept employment her net income will be measured against the agency need requirements. Net income refers to that portion of wages remaining after expenses directly applicable to employment have been deducted including the cost of transportation to and from work and the cost of paying someone to care for the child if necessary. (See Chapter III, pages 106-107.)

Death of a parent sometimes makes available financial resources, such as insurance or survivors benefits, which were not present while the parent was living. This possibility should always be borne in mind by the worker when aid to dependent children applications are made because of death of a parent.

Where death is considered as the cause of deprivation of parental support, the parent's death must be verified before the application is approved. The usual method of doing this is through vital statistics records, but in some instances it may be necessary to resort to collateral evidence secured in the community or through contacting other agencies or the mortuary.

(b) Desertion and Non-Support

The law of South Carolina is that a father is responsible for the support and care of his children. It is, therefore, necessary that every recourse available be used to see that he discharges this responsibility.

Where desertion is one of the factors to be considered in determining eligibility for aid to dependent children, it will be necessary to have proof that the parent, as defined above, has physically removed himself from applicant's and child's home, that every effort to locate him has been made and that his whereabouts is not known. However, where it appears obvious that the parent is not in the home, it may be assumed that he has deserted until otherwise established. The applicant will be required to initiate immediate steps to locate the deserting parent, with the help of the caseworker when necessary, but assistance may be given on the presumptive evidence of desertion while desertion is being definitely established.

In cases involving desertion there will usually be two types of situations. There will be situations where the applicant states that the parent's whereabouts is not known, or his whereabouts may be known but he is not in the home and has failed to support his family. In the first instance it will be necessary to attempt to locate the deserting parent. This usually requires more help by the caseworker, as the agency has resources not known to the applicant. Once a deserting parent has been located, the applicant will be required to make every effort to get support from him, including use of the courts. If the whereabouts of the parent is known, it is just a matter of taking steps to require him to support his family. If he cannot be persuaded to do so voluntarily, then court action must be taken. The caseworker will assist the applicant to the extent needed. In all cases of desertions it is the applicant's primary responsibility to secure support if at all possible. Failure to take required action, or failure to cooperate with the agency in establishing desertion and lack of support will be sufficient reason for denying or discontinuing assistance.

If support is secured, the contribution will be budgeted against the applicant's or recipient's needs in order to determine whether assistance may be given. If the contribution together with other income is not sufficient to meet the applicant's or recipient's needs according to agency standards, assistance will be given or continued.

In some instances a mother leaves her husband's home and the husband claims that he will support her and the children if they will return. In such cases it will be the responsibility of the mother to give evidence that it is impossible to live with her husband. If it appears that she had good reason to separate herself from him, she should be advised to obtain separate maintenance for herself and children. Reconciliation is sometimes possible and court action should not be advised until efforts to get the family together have been exhausted. Assistance may be given while plans for reconciliation or court action are being carried out. If the mother left her husband for no good reason, it will be her responsibility to decide whether or not she wishes to return to him, but assistance may not be given.

A mother is also responsible for the support of her child when she is employed or has resources even though she may be living away from the home where the child is. (See item (f), page 49, Mother Employed and Living Away from Home, and page 43, Children Left With Relatives and Non-Related Persons.)

Information in regard to the Uniform Reciprocal Enforcement of Support Law and how the law may be used will be found in Chapter VI, General Provisions, pages 222-228.
Information in regard to Locating Deserting Parent will be found in this Chapter, page 33.

Notice to Law Enforcement Official, Form 148

In cases where desertion or abandonment by either parent has been established and aid to dependent children is given, the law requires that notification Form 148 be sent to the sheriff in the county in which desertion or abandonment occurred, notifying him that the child or children have been deserted or abandoned by the parent or parents. The applicant will have been informed of the necessity of this notice at time of home visit.

Form 148 is to be sent to the sheriff at the same time that notice of approval is sent to the applicant. It will be necessary to thus notify the sheriff when the deserting parent is:

> A natural parent either by license or common-law marriage, or is the parent of an illegitimate child and parentage has been established.
>
> An adoptive parent, i.e., where the child is legally adopted.
>
> A stepparent, i.e., the legal spouse of the parent of the child. (In counties where they are legally responsible.)

When Father Returns

When a father who has deserted returns to the home, assistance may be continued for one month following the month in which he returns. This should be done when the circumstances make it advisable as, for example, when the father has difficulty in finding employment.

Children Left With Relatives or Non-Related Persons

Where it is established that a father, mother, or both parents have, because of convenience to themselves, left their children in the home of related or non-related persons the children will not be considered as deprived of parental support by reason of desertion. This refers to cases where the parent maintains contact and who can be located, not to cases where the child has been definitely deserted.

I

Common-Law Relationship

A man living in common-law relationship with a woman is responsible for the support and care of his and her children, regardless of whether or not he is married to another woman.

The general law of the State recognizes common-law marriages. Under this law the parties must be free to contract legal marriage, and there are certain other stipulations in the law. However, by regulation the State Department has adopted the policy of considering a man and woman who are living together as having established a common-law relationship and the man has the same responsibility for her and her children as though he were the legal husband. Where such common-law relationships are established, it will be necessary to clear all eligibility factors applicable to legal parents before the children can be considered deprived of parental support.

Since agency definition of a common-law relationship is that a man and woman be living together, it will be necessary to have definite evidence that an applicant for AFDC actually has a man or woman living in the home with him or her before a common-law relationship can be established. As a matter of actual practice this situation usually relates to a mother with children applying for assistance in the care of her children. The question of common-law relationship therefore usually relates to whether or not she has a man living in the home with her who, under agency policy, would be held responsible for the support of the family. In instances where it is determined that the mother actually is living in common-law relationship with a man, it will be necessary to clear eligibility from the standpoint of the man's ability to work for the support of the family.

Mothers With Children Born Out of Wedlock

The question of what to do about mothers who have had a series of relationships with men resulting in the birth of one or more children has always been a stumbling block to caseworkers and society in general. Along with this problem is the matter of a mother who not only has children born out of wedlock but who persists in casual or promiscuous relationships which are apt to produce more children and more problems.

20-303 The agency's position on these problems, insofar as assistance is concerned, is that a father of a child is responsible by law for the support of his child. It is therefore necessary that every effort be made to determine the paternity of a child born out of wedlock and, once determined, to secure support from the father. The determination of paternity and the securing of support is the primary responsibility of the applicant for assistance. The caseworker's responsibility will be to point out the action to be taken and to provide any help that she can. She will not harass the applicant with any undue pressure, but in the final analysis the applicant must decide whether she wants to meet the agency's requirement that every effort be made to determine paternity and to secure support. Failure to accept the necessity of meeting the requirement may be sufficient grounds for denying or discontinuing assistance. Since cases involving out-of-wedlock children may take considerable time to clear, assistance should not be denied pending clearing up the matter of paternity and support. However, steps should be initiated immediately and followed through to a conclusion.

As to the other problem of mothers continuing a practice of casual or promiscuous relations with men, such practices will not be considered common-law relationships. The agency has no desire to inhibit normal relationships, but should these relationships result in the birth of a child, the father will be held responsible for the support of his child.

Divorce or Legal Separation

Divorce or legal separation does not automatically relieve a parent of the responsibility for supporting his child.

The divorce proceedings should be examined carefully to determine whether or not provisions were made for continuing support.

If the divorce proceedings did not make provision for continuing support, applicant or recipient should be required to take further court action to try to obtain support. Assistance may be given in the meantime.

If the divorce proceedings provided continuing support, it will be necessary to determine the amount of support ordered by the court and whether or not the divorced parent is actually making the requested contribution. Only the amount of the contribution being made may be considered in determining the applicant's or recipient's need.

If a divorced parent fails to supply the support ordered by the court, the applicant or recipient should be required to make further effort to see that the court orders are followed. However, assistance will not be denied where the court orders are not followed or where support payments are not sufficient.

(c) Physical or Mental Incapacity

Physical or mental incapacity of a parent frequently results in deprivation of parental support of children. However, it does not automatically follow from the fact that one parent is incapacitated that a child is deprived of parental support. If the mother is incapacitated but the father is able to work, aid to dependent children would normally not be considered. Only in cases where the mother's physical or mental incapacity results in extra-ordinary expenses which the father is not able to meet and still support his children would the children be considered deprived of parental support.

If the father is incapacitated and the mother is needed in the home, no question as to deprivation of parental support will be raised, provided of course, sufficient resources other than the father's ability to work are not available. Incapacity of the father will not necessarily cause deprivation of parental support. In some instances, the father will be able to provide personal care of the children while the mother works to support the family. In considering the ability of the mother to support her children through employment and whether she should be encouraged to do so, refer to this Chapter, page 40.

When physical or mental incapacity is given as a reason for application for aid to families with dependent children, it will be necessary that a physician's certificate, Form 140, be secured in all cases where the father's ability to work is in question. The fact that a person receives Social Security Disability Insurance benefits is not sufficient to certify for AFDC.

citing Fryer

↓32 SCE 519 104 ALR 14 etc.

↓0 S.C. 336

~~10 SC 503~~

~~69 SC 404~~

~~48 SE 298~~

~~101 SC 45~~

~~85 SE 244~~

~~108 S.C. 276 - 94 SE 20~~

citing Jewell

↓3 SCE 220

↓32 SCE 310

citing Lucken

~~55 SC 420 - 14 SE 933~~

↑ ~~69 SC 404 - 48 SE 298~~

~~235 SC 550 - 112 SE 2d 651~~

↓244 SC 373 - 137 SE 2d 281

citing Allen

↓SC 204

~~101 SC 44 - 85 SE 246~~

citing North

↓20 S.C.E. 322

↓24 S.C.E 92

↓26 SCE 512

↓32 SCE 201

↓32 SCE 547

↓9 SC 224

10 SC 334 144 ALR 1243

23 SC 513

~~64 SC 104 41 SE 818~~

~~147 SC 290 145 SE 122~~

220 SC 383 - 68 SE 2d 323

31 F S. 918

citing Whaley

20 SC 527

~~35 SC 80 11 SE 701~~

~~36 SC 460~~

~~41 SC 361 - 19 SE 685~~

~~77 SC 254 - 57~~ SE 856

~~explained 90 SC 248 73 SE 176~~

~~122 SC 504 115 SE 740~~

~~1935 SC 109 110 SE 2d 4~~

citing Hilton

~~9 SE 93~~ ~~10 SC 337, 4 SE 598~~

~~40 SC 38 46 SE 526~~

103 US 31

citing Barefoot

~~31 SCE 554.~~

~~101 SC 294, 85 SE 959~~

~~113 SC 179, 102 SE 16~~

~~140 SC 90, 134 SE 881~~

48 US 1.

citing Britton
~~68 S.C. 38 46 SE 524~~
103 US 311

citing Cockrill
~~11 SCL 118~~

SCL	SCE	SC
10 – 285	9 - 85	5 - 411
11 – 114	9 - 109	10 - 500 (26 SC 270) (73 SC 102)
15 - 256	9 - 113	78 - 210
31 - 209	13 - 212	90 - 233
37 - 434	31 - 551	108 - 271
		150 - 411
		158 - 71
		185 - 131
		204 - 210
		211 - 462
		226 - 317
		235 - 102
		235 - 542

FS
14 - 132

& 220

SCL	SCE	SC
	~~9 - 85~~	~~1 - 204~~
	~~13 - 220~~	~~9 - 224~~
	~~20 - 322~~	~~10 - 334~~
	~~27 - 12~~	~~20 - 327~~
	~~31 - 512~~	~~25 - 513~~
	~~32 - 201, 310, 519, 517~~	[illegible]
		~~244 - 373~~

598 1212

Cohabitation is not marriage if:

§20-1 1) There is no agreement to be married
20-3 accompanying the cohabitation. Johnson v Johnson
235 S.C. 542, 112 S.E 2d 647 (1960)
(a) proof that the two are living together
as man & wife is conclusive unless
rebutted. Allen v Hall 2 N&McC (11 S.C.L.)
114; State v Hilton, 3 Rich (37 S.C.L.) 434.

§20-6 2) Either of the parties has a former wife
or husband living. (unless 7 yrs absent.)
Foster v Nord 244 SC 485; 137 SE 2d 600 (1964)

Care & support
§20-303 (62 amend.)
; Husband has a duty to support wife &
children, legit or not

~~§[illegible]~~
~~Father of bastard child has a legal duty~~
~~to provide for the maintenance of that~~
~~child~~

Kasper v. O'Connell 237 NYS 2d 722
Davis v Hults 204 NYS 865
Mara v Abrams 142 NYS 2d 200
Calzaretta v Mulrain 131 NYS 2d 76

NLRB v Bradford Dyeing Assn.
310 U.S. 318; 84 L Ed 1226; 60 SCT 918 (1940).

- In late March, 1937, workers began to promote ~~th~~ a CIO affiliated union in the factory.
- ~~On April 3, 1937, one of these employees that [illegible] an application form which he had not yet returned.~~
- On April 2 Summersby, Pres.+ Gen. Man. questioned two of these employees about the C.I.O. + suggested "a union of our own in the shop." p. 330
- April 3 + 6 two organizing employees were fired.
- April 6; in a meeting in Summersby's office
  1) Summ said he would not recognize the CIO.
  2) He appointed temp. officers of a shop union
  3) He provided literature about the union + memberships cards to be passed around the shop.
- April 7: a CIO organizer reported to Sum that he had about 75 ~~50~~% of the men signed up + asked for recognition. Sum said he would call him.
- April 8 (or 9): Sum provided a room for men to meet to promote the Federation - the shop union. He said he wouldn't recognize the CIO, ~~[illegible]~~ but would deal with a shop union, which he would

Where employer has, at his discretion, acted favorably to employees in the past, his exercise or threat of exercise of discretion to the prejudice of the employees if the election turned ~~against~~ away from his wishes is unfair labor practice.

- threat of removal of bonuses, pension plan
Hendrix Manu. Co. v N.L.R.B. 321 F2d 100 (5th Cir. 1963) p.105.

- ~~Threat~~ predictions ~~of company closing down, refusal to sign contract.~~
predictions of no more miscellaneous work, less overtime work, employees sent home when machines broke down, no more time off for deer hunting. "It is a violation of §8(a)(1) to threaten employees with a loss of long-enjoyed privileges." @702
NLRB v Louisiana Manu. Co. - 374 F2d 696 (8th Cir. 1967) p.702.

- Promises to cut out Christmas bonus & trust fund if union voted in.
N.L.R.B v Schill Steel Products, Inc., 340 F2d 568 (5th Cir. 1965) pp. 570-71.

treat the same as any other union.

- April 9: The ~~committ~~ Feder officers approach Summ with a report that they have signed 51% of the workers.
- April 9: Summersby recognized the Federation as bargaining rep of the workers.
- April 11: Fed elects officers
- April 16: CIO again approaches Summersby. Is told the workers already have a union.

N.L.R.B. v Bradford Dyeing Assn.
310 US 318; 84 L Ed 1226, 60 SCT 918

NLRB v Clarksburg Pub Co 4th Cir 120 F2d 976 [illegible]

NLRB v Bird Mach Co. 161 F2d 589

in loco parentis:
Chestnut v Chestnut ~~247SC 383~~,
~~129 SE2d 902 (1963)~~. 147 SE2d 269 (1966)

even if one puts himself in ~~the~~ loco ~~[illegible]~~ parentis to [illegible] a child that relationship is temporary & can be terminated at the will of the supporter.

#14

Parent & child #15

Code of laws of S.C. §15-1231
The stepparent of a child is legally chargeable with the support of a stepchild likely to become a public charge provided it is shown to the satisfaction of the court that such stepparent had knowledge of the child's existence at the time of such stepparent's marriage.

1) substant law

42 USCA 1983 -

person who under color of law deprives citizen of rights under Const or laws liable at law or equity.

rights: 14th - due process + equal protection.
42 USCA §§601-609
federal Social Security Act
Civil Rights Act of 1964 - Title VI §601.
non discrim in federally assisted program

2) 3-judge case

28 USCA §2281

... since it seeks an injunction to restrain the Defendant officers of the State of South Carolina ...

3) jurisdiction

A) 28 USCA 1343 (3) + (4) orig juris - dist cts:

(3) redress deprivations under color of state law of rights under Const or cong stat

(4) damages, equitable or other relief ~~fo~~ under cong stat for protect of civil rights.
(see above for statute)

B) 28 USCA §2201 and §2202

ct of U.S. may declare right & other legal relations of parties to an actual controversy within its jurisdiction. Further relief obtainable based on the declaratory judgement.

28 USCA Rule 57 - existence of another remedy

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B) 28 USCA §2201 and §2202
ct of U.S. may declare right & other legal relations of parties to an actual controversy within its jurisdiction. Further relief obtainable based on the declaratory judgement.

28 USCA Rule 57 - existence of another

does not preclude declaratory judgement where it is appropriate.

c) 28 USCA §2281 & 2284

(1) perm inject restraining state order only by 3 judg court

(4) ~~procedure~~ & make up for 3-judge proceeding.

parties ---

particular ~~denied~~ assistance ~~under~~ provided for citizens of S.C. under 71 SCCL §11 and 42 USCA §601-609 under the "common-law relationship" regulation ...

class ~~FRCP Rule 23(a) (1) (2) (3)~~

~~(a) 1) impractical to join~~

~~2) particular will adequately represent their interests~~

~~(3) ~~parties~~ rights are several & there is a common question of law or fact affecting the several rights & a common relief is sought.~~

~~(1) rights are joint or common~~

?

FRCP Rule 23(a) and (b) (2)

(a) 1) ~~class~~ joinder of all impossible

2) common questions of law or fact applic

3) claims typical of those of the class

4) reps will fairly & adequately protect the ints of the class

(b) (2) party opposing has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

parties
def

- South Carolina Board of Public Welfare under whom the State Dept of Public Welfare operates §71-1, and who appoints the Director §71-5.
- State Director of Public Welfare who executes the decisions and carries out the policies of the Board & who sees that the laws relating to the activities and responsibilities of the Board are obeyed. [redacted] and is the administrative head of the State Department of Public Welfare §71-5 ~~and~~ which is authorized to:

1) supervise and administer the public welfare activities and functions of the State &
2) adopt all necessary rules and regulations and formulate policies and methods of administration, when not otherwise fixed by

law, to carry out effectively the activities and responsibilities delegated to it, §71-8, and which supervises the administration of assistance in the State. §71-9.

~~county~~ ~~County director~~

County Board - representative of State Dept in administering welfare activities within the county §71-36

County Director - chief executive officer of the county board electing him, performing such duties as are assigned him by the county board, state Dept or law. §71-[illegible]34

(a) The [illegible] State-wide officers, defendants here have been required under 42 USCA§601-609 to make state plan conform to Const + provisions of 42 USCA §601 et seq.

§71-92 for ADC in partic.

(b) Under S.C. law the State Dept is to cooperate with any Federal agency for the purpose of carrying out matters of mutual concern and to administer any Federal funds granted the State for Public Welfare activities. §71-8 and to take action from time to time to secure for the State all possible Federal aid. §71-12.

(c) Fed funds under 42 USCA 601 make up a major share of ADC grants in S.C.

(d) Under Code of S.C. §71-92 defendants are required to administer all funds made available or appropriated for ADC grants. ~~[illegible]~~ §71-91 defines "dependand child" ~~in the~~ in the same terms as the federal statute at 42 USCA §606:

Under §71-95 the county dept, as the agency of the State dept is directed to grant aid to such child:

In King v Smith, ~~Oct term~~ No. 949, Oct. term (1967), the Supreme Court construed 42 USCA §606 to ~~refer~~ mean by parent only one who is legally responsible for the well-being of the child. The court said ~~[illegible]~~ that the presence in the home of one not legally responsible for the child does not affect the child's eligibility for ADC grants.

11. By promulgating the "common-law relationships" ~~rule~~ regulation etc.

A. Denial of equal protection of the laws by arbitrarily deciding to ignore the applicable provisions of S.C. law in determining whether a common-law marriages exists between recipient & the cohabitant. *

B. Denial of ~~equal protection~~ due process of law . . .

C.

* Code of laws of S.C. §20-41 giving the court of common pleas authority "to hear & determine any issue affecting the validity of a contract of marriage.

South Carolina
— Le Clercq

MEMORANDUM FROM
CARL RACHLIN

TO: AFDC Applicant
Father in home
less than $500
w/8 kids
— nationality of elders
Sumter Co - Furney
Buford Co - T
M. Plaintiffs
So Carolina

NOTE:

I ON Definiteness of evidence of ~~change~~ difference ~~from~~ between cohab ~~to~~ and marriage —

Fryer v Fryer @ 101-103, and State v Whaley @ 503 illustrate this by its effects on the legitimacy of the children.

Lucken v Wichman @ 415 places the rationale for it on a broader statement for society to protect a marriage specially above other unions of people, it must first know what a marriage is.

Jewell v Magwood @ 114 calls marriage "one of the most important engagements into which human beings can enter, [which, therefore]... ought not to be established on light or uncertain evidence

From the earliest cases, South Carolina's courts have recognized the extreme seriousness of assigning the status of marriage to the relationship of two people who are cohabiting. The rationale was at times the narrow consideration of the effect legal recognition of the marriage would have on the legitimacy of the children. State v. Whaley, 10 S.C. 500, 503 (1878), Fryer v. Fryer, 9 S.C.Eq. (Rich. Cas.) 85, 101-103 (1831). In other cases the court spoke of the broad ~~l~~ legal and societal consequnces of the true marriage contract, Lackan v. Wichman, 5 S.C. 411, 415 (1874), Jewell v. Magwood, 9 S.C.Eq. (Rich. Cas.) 113, 114 (1833). The court in Jewell v. Magwood, ~~supra~~ id. at 114, calls marriage "one of the most impobtant engagements into which human beings can enter, (which therefore)... ought not to be established on light or undertain evidence." In the ~~case of Ex parte Blizzard,~~ ~~the~~ more recent case of Ex parte Blizzard, 185 S.C. 131, 193 S.E. 633 (1937) the court reiterated the policy of Jewell v. Magwood: "The courts of this state are reluctant to declare a common-law marriage unless the proof of such marriage is shown by strong and competent testimony."' Ex parte Blizzard, supra. at 634. On the basis of this policy, the court cited the case of Pooler v. Smith, 73 S.C. 102, 52 S.E. 967 (1905), for the proposition that ~~the~~ ''the party claiming ~~[illegible]~~ common law ~~l~~ marriage must prove the same by a preponderance of the testimony." Ex parte Blizzard, supra., at [illegible]

The existence of the marriage is not certain even if the outward appearances of marriage are found. In Rodgers v. Herron, 226 S.C. 317, 85 S.E.2d 104 (1954) Justice Lagge explained:

> Somewhat analogous is the situation that exists where the issue is insanity. Circumstances may indicate insanity, but ordinarily the fact cannot be established with certainity until there is adjudication. id at 113.

Certainly there is no basis in the law of South Carolina for a state administrative body to make ex parte determinations of such a complex and serious question simply to save itself the time and trouble of a proper law suit.

There are two cases in South Carolina which can be cited for the proposition that the court will presume in favor of the marriage, and place the burden of proof on the party alleging that there was no marriage. In the first case, Tarleton v. Thompson, 125 S.C. 182, 118 S.E. 421 (1922), the judge stated the policy of favorable presumption on appeal when the trial record showed testimony by the woman who had been party to the relationship ~~and~~ by one other witness that there had been a marriage; the record showed further testimony by the woman that her children had ~~begun~~ fathered by the alleged husband, and ~~testimony~~ that ~~the man~~ he had lived with her as his wife and had treated her children as his own. In the face of such testimony, there is little question but that on appeal there would [illegible] significant burden on the party alleging no marriage. But this case should not be read to affect the general policy that the South Carolina courts will be slow to declare the existence of a common law marrige on any but very certain evidence, because in fact in this case very certain evidence of the marriage had been entered into the record at the trial. The second case in which the court presumed in favor of the marriage is Tyson v. Weatherly, 214 S.C. 306, 52 S.E.2d 410 (1949). In this case the widow of Weatherly ceremonially married his son (her stepson) after Weatherly's death. At South Carolina law such marriages are voidable but not void. At the time of this action both parties to this voidable marrige were dead and the judge ruled that the marriage was presumed to have continued to exist until their deaths unless evidence was shown that some action to avoid the marriage had been taken during ~~the~~ their lives This case does not involve the question of common law marrige and so is not relevant to the question of where the burden of proof lies in a suit seeking judgement on the validity of a common law marriage.

ELEMENTS OF A MARRIAGE

There are two elements necessary for a legally recognized marriage in South Carolina; both are based on the fact that marriage is a contractual relation. E.g., Johnson v. Johnson, 235 S.C. 542, 112 S.E.2d 647,651 (1960); Rutledge v. Tunno, 69 S.C. 400, 48 S.E. 297, 298 (1904); Fryer v. Fryer, supra. at 29.

From the earliest cases, South Carolina's courts have recognized the extreme seriousness of assigning the status of marriage to the relationship of two people who are cohabiting. The rationale was at times the narrow consideration of the effect legal recognition of the marriage would have on the legitimacy of the children. State v. Whaley, 10 S.C. 500 (1878), Fryer v. Fryer, 9 S.C.Eq. (Rich. Cas.) 85 (1831), The first element is that the parties must be legally free to contract marriage. If either party has a spouse whom they know to be living, the attempted marriage is bigamous and void. Howell v. Littlefield, 211 S.C. 462, 46 S.E.2d 47, 48 (1947); Lemon v. Lemon, 158 S.C. 71, 155 S.E. 285 (1930); Bannister v. Bannister, 150 S.C. 411, 148 S.E. 228, 229 (1929); Code of Laws of South Carolina, Sec. 20-6 (   ).

The second element is that the parties must intend to live as man and wife. Of course this is not difficult to show when there has been a marriage ceremony. But when common law marriage is alleged and there is no ready evidence of this intent, the burden of proving it still lies on the party alleging the marriage. The burden does not disappear when it grows heavy; unless the two people can be shown to have intended to live as man and wife, their relationship will not be recognized as a marriage by the law of South Carolina. Rodgers v. Herron, supra. at 113; Tedder v. Tedder, 108 S.C. 271, 94 S.E. 19, 20 (1917); North v. Valk, Dud. (13 S.C.Eq.) 212 221 (1837); Jewell v. Magwood, supra. at 114; Fryer v. Fryer, supra. at 92, 97-98. Furthermore if it is shown that at the start of their relationship, the parties ~~did not intend to be~~ were not living as man and wife, the court will not allow the mere continuance of this same relationship to ripen into a common law marriage. Howell v. Littlefield, supra. at [illegible]

101 S.C. 40, 85 S.E. 244, 246 (1915); Rutledge v. Tunno, supra. at 298; State v. Whaley, supra. at 502. This is true whether the parties are not free to contract marriage, being already married, Howell v. Littlefield, supra., or they simply do not intend their relationship to be that of man and wife, Rutledge v. Tunno, supra. Such relationships can become common law marriages, however (despite the court's mistaken interpretation of the doctrine in Rutledge v. Tunno, supra. at 298).

When the common law marriage is prevented by the fact that one of the parties is already married, a valid marriage is possible when the first is ended either by death or divorce if the parties show that they intend to change the nature of their relationship and to begin a legitimate common law marriage. Campbell v. Christian, 235 S.C. 102, 110 S.E.2d 1 (1959). In this case, Campbell had lived with a Miss Beulah Poole for periods of time during both his first marriages, thus the beginnings of their relationship were illegal. After the removal of these barriers, Beulah Poole moved into the Campbell house, accompanied him around town as his wife, took thename of Campbell, and named the subsequent children by him Campbell. (The children by him before this time, she had named Poole.) The court found that these changes were evidence that after the removal of the barrier to their marriage, their relationship underwent"a fundamental change" and that this change in intent coupled with the prior removal of the barriers to their marriage satisfied the requirements of common law marriage. id. at 4.

In Jackson v. U.S., 14 F. Supp. 132 (D.C.S.C. 1936), aff'd 89 F.2d 572 (4th Cir. 1937), aff'd on other grounds 302 U.S. 628 (1938), Jackson had begun living with a woman without either party intending that their relationship be a marriage. The court held that under South Carolina law, "continuance of illicit relations between a man and a woman cannot of themselves ripen into marriage" but, that "declarations and manner of the parties, after a period of concubinage," could evidnce a change in that relationship to a true common law marriage. id. at 133. All of the South Carolina cases agree that mere passage of time does not affect the status of the parties, that "where the character of the intercourse, in its beginnings is ascertained, the presumption is, that the intercourse is carried on in the same character, unless the contrary is made to appear." Fryer v. Fryer, supra. at 98.

And so, it is clear, that the determinative element in the question of common law marriage is the intent of the parties. The party alleging the marriage must prove the fact that the parties intended to live as man and wife. There are three sorts of actions by the alleged couple which serve as evidence of the intent to be living as man and wife: 1) Cohabitation, 2) by the parties, 3) General repute in the community. It is important to remember that:

> There is a clear distinction between the fact itself, of marriage, and the evidence of that fact.... The acknowledgement of a marriage does not constitute the marriage any more than the acknowledgement of any other fact constitutes that fact. It is evidence only. Fryer v. Fryer, supra, at 93.

In Fryer, the 1831 case that is still the leading case on South Carolina common law marriage, the parties agreed to misrepresent the state of their relationship, claimed that they had been ceremonially married, promised each other that they would marry in the future, and lived together on this basis. The court decided that the intent to misrepresent the facts of the past events and to marry in the future showed that there was no present to be man and wife. Concerning the acknowledgements that they were married, he said:

> In judging such adknowledgements we must keep in mind that if they have been wrung from parties under a sense of shame, or extorted by a fear of ill-treatment, or odium, a sound judgement will depend less upon them than if they were made spontaneously or arose naturally. id. at 96.

In Fryer, the court found that there had been no valid marriage, despite the fact that to all outward appearances the couple were living together and were claiming to be married. The impart of this decision on the current procedure of the South Carolina Welfare Department is clear. Fryer, and the whole line of

South Carolina welfare cases consistently stress the fact that ~~a court of law is the proper place to determine the fact~~ the fact of a common law marriage is a complex and difficlut thing to prove, and that without a proper hearing of all the circumstances of the relationship, on cannot ~~dec~~ decide whether two people are living in a common law marriage or not. By that same reasoning, one cannot decide the issue of support and maintenance without hearing all the circumstances of the relationship because in South Carolina, support is ~~depd~~ dependent on the existence of the marriage. If there is no marriage, ther is no duty to support any but ones own natural children.

The first element ~~necessary to a comm~~ is that both parties must be legally free to contract the marriage. If the parties cannot contract marriage their attempt is void. Howell v. Littlefield, 211 S.C. 462, 46 S.E.2d 47, 48 (1947); Lemon v. Lemon, 158 S.C. 71, 155 S.E. 285 (1930); Bannister v. Bannister, 150 S.C. 411, 148 S.E. 228, 229 (1929)~~6/8~~.

MATTew Perry
JenKins & Perry
1107½ WAshingTON ST.
Columbia, S.C.

803-252-7278

looking for plaintiffs,
send him complaint

Allen v Hall 2 N & McC. (11 S.C.L.) 114 (1819).

"In a question, whether there has been a marriage, proof that the parties lived together, as man & wife, if not rebutted, will be conclusive. But this evidence is only presumptive, and like many other presumptions, may be rebutted by circumstance or positive proof.

116

~~It does not follow~~ Declarations of marriage should not be conclusive. "The time, place, manner, and an infinity of other circumstances will have their weight in determining the degree of credit which will be given to them."

"If these declarations be contradictory, it will of course create doubt, and must be left to the jury to determine."

same as Howell

BANNISTER v. BANNISTER 150 S.C. 411, 148 SE 228 (1929)

1) Where ~~husban~~ the make partner in the marriage ceremony ~~[illegible]~~ ~~he~~ did not marry in good faith, not having
229 been divorced from his first wife, nor having waited seven years since last seeing her, the marriage ceremony is without effect

2) Where the two parties, thus not legally married, ~~[illegible] together~~ carry on ~~a~~ their relationship after the true wifes' death, there is no ~~ma~~ common law marriage ~~[illegible]~~ unless their status is changed "by some subsequent agreement to be husband and wife."

Ex parte Blizzard
185 S.C. 131, 193 SE 633 (1937)

William Blizzard lived for a time before his marriage with Lizzie Ford. Later he ceremonially married Maggie Craft. The probate judge ~~recognize~~ ~~declined~~ refused to find that Blizzard had a common law wife in Miss Ford + so found no bar to the marriage to Miss Craft.

~~Ab~~ On appeal:

634 1) "The party claiming common law marriage must prove the same by a preponderance of the testimony." Cooler v. Smith.

634 2) "The facts + circumstances must show an intention on the part of both parties to enter into a marriage contract, and is ~~usually~~ evidenced by a public and unequivocal declaration by the parties." Fedder v. Fedder.

634 3) "The courts of this state are reluctant to declare a common-law marriage unless the proof of such marriage is shown by strong and competent testimony."

corallary to Howell v Littlefield

4

#3 #4 #5

Facts trier

fund change

Campbell v Christian 235 SC 102, 110 SE2d 1 (1959)

In an appeal of a probate court ruling that a valid common law marriage had been effected between testator and co-respondent Beulah Poole Campbell before testator's ~~marriage~~ attempted marriage to appellant & ∴ that this subsequent attempt at marriage was void:

1) Testator Campbell had carried on an illicit relationships with then Beulah Poole during his first + second marriages + divorce from his second

2) after the death of his wife – the removal of the legal barriers – Beulah Poole

  A) moved into his house

  ~~B) took the name of Campb~~

  B) went about the town with him as his wife

  c) took the name of Campbell

  d) named her subsequent children by him Campbell (whereas her children by him prior to this time were named Poole)

~~3)~~

3) ~~After~~ The birth certificates of the later children show ~~both~~ Woodrow Campbell and Beulah Campbell as ~~was~~ father + mother + states that they are married.

4 The fact that ~~-~~ Beulah Poole Campbell said she had not been married to him will not have effect if

1) it can be reasonably understood to mean they had not been ceremonially married,

2) there is evidence that after the removal of the final barrier the relationship underwent "a fundamental change" as evidenced by the "conduct and general repute of both parties over a period of many years."

"Illicit relationship, though accompanied by cohabitation, is not transformed into the legal state of marriage by mere lapse of time."

But

4 When a time comes that both parties are able to contract marriage, "mutual recognition of the marriage relation" will satisfy the requirements of common law marriage.

issue for jury - 4

Cave v Cave 101 SC 40, 85 SE 244 (1915):

246 – The fact of marriage, even if legit depends on it, may be proved by repute.

246 – If the beginning of the relationship is proven to the jury to be concubinage, "the presumption of fact is that they so continued until a different mode of life is proven by the plaintiffs.

Cockrill v Calhoun 1 N&Mc (   ) 285 (1818)

287 Question of marriage is for the jury.

On appeal the weight of evidence was judged to be with the verdict of no marriage:

"The only evidence of marriage was the general opinion, arising from their living together, unaided by any positive proof of cohabitation, and her stating, in one instance, that they were married; opposed to this was her disowning the name of M'Connel, his not taking upon himself the settlement of the estate of her deceased husband, and his finally leaving her, and living with another in the character of a wife, and the general opinion, (arising out of the knowledge of the whole circumstances,) that they were not married; and the provisions of the will itself might have furnished the strongest inducements to an intercourse unhallowed by the bands of matrimony."

FACTS – Woman left her husband's estate during life or widowhood, employed overseer M'Connel, who lived with her for three years, during which time general belief in the neighborhood they were married. 1 witness to joint declaration. After this tim M'C left + lives with another as wife.

#⑤ Davis v Whitlock 90 S.C. 233, 73 S.E. 171 (1911)

Defendant Araminta Whitlock appeals a judgement from the circuit court holding her marriage to Wylie S Davis null in accordance with Davis' action.

Aram had ~~A~~ married a William Whitlock, ~~[illegible]~~ and he had deserted her ~~after~~ in 1868. In 1887, never ~~not~~ having heard ~~from~~ of Whitlock again she married Davis, At the time of this marriage, she testified later, "she did not know whether Whitlock
172 was dead or alive, and that she made no inquiries about him."

Later she learned that Whitlock had been alive in 1887, & had only died in 1895.

1) ~~The fact that she made no effort to find~~ The discovery that the true
175 husband, though absent, was still alive at the time of the second marriage voids that marriage.

2) In contrast with the case of Campbell v Campbell, 1 H. L. Sc. 182, these parties
175 did not begin their cohabitation knowing that its beginnings were adulterous.
So the fact that the courts in this country have refused to follow the House of Lords

1 in holding that adulterous cohabitation
175 can ripen into marriage simply by
the death of the adulterer's spouse,
this line of decisions ~~holding such~~
is not controlling here.

3) "When the parties have intended marriage,
being ignorant of an existing impediment,
all that is to be established by cohabitation
... subsequent to the removal of such
impediment is the carrying into effect
176 by the parties of their original purpose;"
4) but, when the original purpose was to
live in adultery, the evidence, under
similar circumstances, must be
sufficient to show an abandonment of
such purpose and the execution of
a new one."

DAVIS – re: Whaley – Eq (Rich. Cas.) 1831

quoting Whaley's objection to the lower decis: –

176 "That marriage, assuming the original illegality could not become the source of the legal relation of marriage through any acknowledgement of the fact of its existence."

& commenting:

"This we think all that the case decides on this subject. It is perfectly obvious, as held by the court, that no mere acknowledgement or admission by the defendant in that case or by the plaintiff in this that he had contracted a second marriage while the first was in ~~effect~~ existence could make the second marriage valid. To produce that effect, there must be, as there was ~~here~~ in this case, not only profession that the marriage relation was assumed, but the actual continuation in it after the removal of the obstacle. We are not inclined to accept any dictum of C J Willard going beyond this because we think it contrary to the reason etc.

Fryer v Fryer   9 S.C. Eq. (Rich. Cas.) 85 1831

~~Marriage~~ Again question is testator's will. If Rachel Fryer had been married prior to her marriage to ~~a~~ testator, then ~~the~~ she had a husband ~~one~~ alive at their attempted marriage + it is ∴ void:

Johnston, Ch.

"Marriage, with us, so far as the law is
concerned, has ever been regarded as a mere
civil contract. Our law prescribes no ceremony.
It requires nothing but the agreement of the
parties, with an intention that THAT AGREEMENT
92 shall, per se, constitute the marriage....
It is the agreement itself, and not the
form in which it is couched, which constitutes
the contract. The words used, or the ceremony
performed, are mere evidence of a present
intention and agreement of the parties."

"There is a clear distinction between the
fact, itself, of marriage, and the evidence
93 of that fact.... The acknowledgement of
a marriage does not constitute the marriage,
any more than the acknowledgement of any
other fact constitutes that fact. It is evidence
only."

93

properly

And where ~~counter evidence~~ retraction of the acknowledgement would not substantially prejudice the interests of third parties, the parties involved ~~can~~ may give ~~evidence~~ counter-evidence that "what they have acknowledged did not, or could not exist."

"I need hardly observe, that cohabitation and repute, which are also only evidence of marriage, will be more or less convincing, according as the cohabitation has been more or less interrupted, or the repute more or less general; and will not influence the judgement at all, if explained away or rebutted by clear proof that the parties were never married.

These two enterred no contract of marriage, but agreed to misrepresent the current facts, enter into an illicit intercourse, and marry later at a convenient time.
The declarations were intended to refer to their attempted ceremonial marriage which ~~it~~ was prevented by the absence of a minister.
This combination of intents: 1) to deceive

as to past events + 2) to marry in the future bars the interpretation that they intended _to be married_ at the time of their acknowledgements.

In judging such acknowledgements we must keep in mind ~~whether~~ that if they have been wrung from parties under a sense of shame, or extorted by a fear of ill-treatment, or odium, a sound judgement will depend less upon them than if they were made spontaneously or arose naturally.

When the parties "do not understand the copula to be lawful, — do not intend that it shall, per se, constitute the marriage relation, — but, on the contrary, stipulate
97 that the marriage shall, instead of preceding or accompanying the act, follow it, it would never do to pronounce that copula to be any thing else than unlawful..."

"Where the character of the intercourse, in its beginnings is ascertained, the
98 presumption is, that the intercourse is carried on in the same character, unless the contrary is made to appear."

ON
COHABITATION + repute:

"If parties be found living together as
man and wife, without any account
or knowledge of the origin of their commerce,
100 the presumption is in favor of their having
been married.... But when we know
the origin of the connexion [sic] to have
been unlawful, the continuance of that
connexion can never become lawful.

In a case such as this, where an
illicit beginning is coupled with divided
opinion as to the repute of the~~ir~~ following
102- cohabitation, we will not presume that
103 the parties intended to be married. ~~[illegible]~~
There must be clear evidence of a
change in the nature of the cohabitation
before it becomes recognized as marriage.

#① #② Howell v. Littlefield, 211 S.C. 462, 46 SE2d 47 (1947)

In an appeal questioning the testator's marriage to Laura ~~Williams Edward~~ Berry, the point of attack was ~~a~~ her former marriage from which she had not been divorced. If that marriage was valid, the marriage to testator was not.

1) Laura Berry had undertaken to marry one Crisp in 1932. This ceremony was void because Crisp already had a wife.

2) Crisp's true wife died in 1938.

3) Did the removal of the barrier to their marriage allow ~~them to~~ their relationship to become one of common law marriage simply on the grounds of continued cohabitation?

No

1
48

1) The Crisp-Berry relationship prior to 1938 was clearly illegal.

2) Mere continuation of this relationship ~~without~~ after the barrier to legitimacy was removed did not make it legitimate,

3) There had to have been a "new, mutual agreement" that they would ~~enter a~~ live as man and wife along with the cohabitation.

also jury question 48

Jackson v U.S. 14 F Supp 132 (D.C.S.C. 1936)
aff'd 89 F 2d 572 (4th Cir. 1937)
aff'd on other grounds 302 U.S. 628 (1938).

Jake Jackson lived with a woman whom he had not ceremonially married. He stayed in her house, ~~but for one brief return to his sister's home~~. The woman retained her
@ 132 maiden name, but named the son she bore ~~him~~ ~~aft~~ Jackson. They lived openly as husband & wife & child & were recognized as such in the community.

When Jackson entered the Army, however, he said that he was unmarried & his closest relative was a sister.

→ Under S.C. law, "continuance of illicit
@ 133 relations between a man and a woman cannot of themselves ripen into marriage" but

"declarations & manner of the parties, following a period of concubinage, may be liberally construed to create a state of marriage in support of legitimacy of offspring, & of rights arising under the laws of dower & of inheritance."

– the jury found marriage.

2

11

Jewell v Magwood 9 S.C. Eq. (Rich. Cas.) 113 (1833).

1
114
1

Where parties agree to marry in future, and afterwards cohabit, the law infers that this cohabitation was an execution of the previous agreement.

SAME AS

(Fryer v Fryer @ 97 – If an agreement be made by words in futuro, that the parties will marry; and that the act of their coming together, shall, per se, signify that they have thereby concluded their contract: there the copula is a performance of the contract, and by perfecting reduces it from an executory into an executed agreement.)

114 jury question

11/② 4/③ Johnson v Johnson 235 S.C. 542, 112 S.E. 2d 647 (1960)

~~[illegible]~~ In the ~~[illegible]~~ attack on Howard Johnson's will question is whether marriage of testator & Grace Clark came before or after the making of the will. ~~If before~~ If there was a valid c-l m then the marriage came before & the will survives, if no c-l m had been effected, the ~~a~~ ceremonial marriage after the making of the will voids the will.

@413

1) Quoting Lucken v Wichman 5 S.C. 411 "The existence of a marriage is a question of fact.... If it depends on an express contract, there will be less difficulty in ascertaining the fact, for there the evidence will refer to a particular transaction.... If, however, it depends on cohabitation & repute, then the effect must be judged by a comparison of all the circumstances relied on by both sides, and even cohabitation & repute will not avail 'where the proof is clear that the parties were never married.'" 651

2) Any contradictory evidence as to the status of the parties ~~and is for the trier of facts to~~ makes the question one for the jury 652

13

Lemon v Lemon 158 S.C. 71, 155 SE 285 (1930)

citing Bannister as controlling & holding the same thing.

Lucken v Wichman 5 S.C. 411 (1874).

413 On jury question & repute see Johnson v Johnson quoting Poynter on Marriage and Divorce, p 56:

415 "as marriage depends on society for protection, it is highly expedient that its existence should be unequivocally demonstrated."

North v. Valk, Dud. (13 S.C.Eq.) 212 (1837)

Woman began intercourse with man 2 years after the disappearance of her husband + several years before his death.
∴ beginnings were illicit.

219-220 2) There is conflicting evidence as to whether they were known as husband + wife. The better to the effect that they were not (those closest to them).

3) "There was admittedly no actual contract of marriage per verba de presenti; the only claim is based on a promise of marriage per verba de futuro followed by ~~out~~ carnal intercourse:

221 'When carnal intercourse follows a promise of marriage, between persons who have heretofore had no such intercourse, the presumption may be reasonable and just, that it was induced by the previous promise, and intended to be in execution of it. But how can any presumption arise, when it is only a continuation of an already subsisting intercourse?' ".

(new page)

North ~ VALR (cont'd.)

It might be of dangerous consequence,
that every careless promise drawn from
an infatuated man, in the course of a
criminal connection, by, perhaps a
222 licentious and artful woman, should have
the effect of fastening her upon him as a
wife. The tendency of this, I fear, would
not be in favor of purity of manners
or the sanctity of marriage; but very
much the contrary."

H
(10)

Rodgers v Herron 226 S.C. 317, 85 SE 2d 104 (1954)

In a suit against trustee by secondary beneficiary based on trust provision that payments were to go to primary beneficiary during her widowhood, the secondary benef claiming that the primary benef had entered a valid common law marriage & so was no longer eligible for ~~pa~~ the trust payments:

1) Quoting Tedder - c l m depends on facts & circumstances evidencing intent to live together as husband & wife & not in concubinage.

113

2) "Such facts are often difficult of ascertainment where the intent of the parties has not been formally and publicly declared..."

3) "Somewhat analogous is the situation that exists where the issue is insanity. Circumstances may indicate insanity, but ordinarily the fact cannot be established with certainty until there is an adjudication."

Legge, Justice S. Ct. of S.C.

Rutledge v Tunno 69 SC 400, 48 SE 297 (1904).

298 - marriage is a civil contract in S.C.

298 - only present agreement of parties necessary

298 - but intercourse without agreement to be h+w makes the relationship illicit.

298 "When we know the origin of the connection to have been unlawful, the continuance of that connection can never become lawful." citing Fryer wrongly.

298 The fact may be proved by:
1) witnesses to a ceremony
2) witnesses to subsequent declarations
3) conduct + attitude of parties to the world.

In this case:
1) There were no public appearances together
2) His conveyances of real property showed no renunciation of ~~any~~ dower by her
3) The community regarded him as a bachelor.
4) His will did not single her out, but listed her among his servants.
5) She was a Negro, he white.

see also Ex parte Romans 78 S.C. 210,
58 S.E. 614 (1907).

Under the S.C. statute – 13 St. at Large, p. 291 – then applicable which read:
Cohabitation, with reputation or recognition of the parties, shall be evidence of marriage
614 in cases criminal & civil." the court held that a marriage ceremony before witnesses, but without clergy as the statute provides "should" solemnize such a ceremony, was valid.

1) The ceremony before witnesses
2) Publicly acting as if they were married.

this was sufficient ~~that it~~ to bar a latter marriage between the husband & another women.

State v Barefoot 2 [redacted] Rich.[illegible] 209 (1845).

If a man remarries when he is legally married to another, still alive, the result is bigamy & no marriage at all.

State v. Britton 4 McC 256 (1827).

Conviction for bigamy when his first marriage was shown by
1) declarations by the accused
2) proof of cohabitation for 14 years.

STATE v HILTON 3 Rich (S.C.L.) 434 (1827)

The marriage ceremony need not be proven by eye-witness account for the courts to recognize marriage. Uncontradicted evidence of declarations of the parties & of their cohabitation, ~~will~~ are proper evidence that a marriage exists.

The opposite holding in England is not applicable to our situation. There the marriage is regulated by law & almost all are recorded. Here there are a variety of religious ~~exercises~~ ceremonies possible & few involve recording. Much of our population has immigrated from other states or other countries. Serious results would follow upon a rule that cohabitation & reputl would not be evidence of the relationship.

State v Still 68 S.C. 37, 46 S.E 524 (1903)

524 — In criminal cases marriage can be proved by evidence of cohabitation + repute.

STATE v. WHALEY 10 S.C. 500 (1878).

"Cohabitation having its origin in an illicit compact is presumed to continue in that character until changed by the lawful understanding of the parties into the relation of marriage."

502 The conduct of parties, such as their declarations and actual cohabitation, may be proved as evidence to infer the existence of the marriage contract. It is erroneous to say that such delarations, accompanied by cohabitation make the contract; they are merely circumstances entitled to weight with all other circumstances properly bearing on the question, such weight to be admitted with due regard to the legal presumptions affecting the question."

502 If the parties are incompetent to contract marriage together, as when either is under the age of legal consent, or previously married, having a lawful husband or wife living, the marriage is invalid and cohabitation resulting therefrom illicit."

referring ~~back~~ To 1st quote

503

"Recognition of the marriage relation by the parties is generally accepted as ground for inferring a contract of marriage; but if the nature of that recognition is such that it points exclusively to an illegal transaction as the source from which that relation has sprung, it could not have the effect to change a state of illicit cohabitation into the legal state of marriage. The recognition must be of such a nature as to point to a contract of marriage at some time when the parties are able to contract."

see explan in Davis v Whitlock

STATe v WArd 204 S.C 210, 28 SE2d 785
(1944)

Fred Ward was convicted of rape. The
S.Ct. found error in the trial judge's
1 refussal to allow evidence ~~of common~~
~~law~~ "tending to show a common
787 law marriage" affect the question of
rape:
1 1) Ward + pros'x agreed to be h + w before the
intercourse
786 2) Ward introduced her to his family, the
minister of his church, his sister's family,
neighbors as his wife + she at no
time contradicted him.
3) After the first of the declarations, the
lived as man + wife for a week before her
father took her away.

Stringfellow v. Scott 9 S.C. Eq. (Rich. Cas.) 109 (1833)

Question is whether man + woman married while man's true wife lived, became man + wife after true wife's death with no further ceremony.

(1) "With us, the marriage is complete, for every purpose, by the contract, without the celebration."

(2) "For a long time [over 15 years], they recognized and treated each other as man & wife ... But, for aught that appears, they treated each other in the same manner during the life time of ... [the true] wife, when no matrimonial connexion [sic] could exist between them."

(3) The acknowledgement in his will that she is his wife is very strong evidence that their ~~circum~~ relationship had been legitimated by their intending to be man & wife after the 10 year absence of the true wife.

(4) But I believe that the question is one for a jury to decide whether "there was actually an agreement or understanding between them, after the death of Stringfellow's second wife, to stand together in the relation of h & w.

Presumption of marriage:

26 + 28

Carleton v Thompson 125 S.C. 182, 118 S.E. 421 (1923

421 "The presumption is in favor of the marriage."

facts Wife

1) ~~Bride~~ + one other witness testified to ceremony.

2) Wife testified her children were by that man.

3) Man lived with her as wife + treated children as his own.

so

marriage + legitimacy of children presumed ~~unless~~ + burden is on the other side to show no.

Tyson v Weatherly 214 S.C. 306, 52 S.E. 2d 410 (1949)

412 – Widow of Weatherly after her death ceremonially married her stepson. Such marriages are voidable, not void, + since both are dead, the marriage will be presumed to have existed 'til their deaths unless evidence of some action brought during their lives to avoid the marriage be shown.

Tedder v Tedder 108 S.C. 271,
94 S.E. 19 (1917).

Question is conveyance of property. William Tedder cerem marr Jemimah Tedder + had children by her. After she died he began living with a Negro, former slave, Adeline. Upon his death, his property was left entirely to his children by Adeline

1) "The difference between marriage + concubinage in the circumstances rests in the intent of the cohabiting parties." 20

2) The intent in marriage is usually evidenced by a public and unequivocal declaration of the parties, but that is not necessary, ... it may yet rest in circumstances 20

3) As it is so contrary to the public custom that a white man should marry a Negro we will presume no such intention + ~~buden~~ burden those who allege the marriage to prove it. (The law of the state did not prohibit such marriages at that time.) 20-21

4) We find no marriage.

A) Evidence shows that the two called themselves husband & wife & cohabited as man & wife. (21)

BUT overriding is

B) This conduct might have simply been a sacrifice to decency, the two knowing, and their neighbors knowing, that they didn't consider themselves husband & wife. (21)

c) The cohabitation was immoral at its inception & there is not sufficient proof that it was ever changed.

d) The neighbors who described the relationship did so in restrained, equivocal language.

1 — Allen v Hall 2 N& McC (11 S.C.L.) 114 (1819).

2 — Bannister v Bannister 150 S.C. 411, 148 SE 228 (1929).

3 — Ex parte Blizzard 185 S.C. 131, 193 SE 633 (1937).

4 — Campbell v Christian 235 S.C. 102, 110 SE2d 1 (1959).
5 — Cave v Cave 101 S.C. 40, 85 S.E. 244 (1915).
6 — Cockrill v Calhoun 1 N& Mc (10 S.C.L.) 285 (1818).

7 — Davis v Whitlock 90 S.C. 233, 73 S.E. 171 (1911).

8 — Fryer v Fryer 9 S.C. Eq. (Rich. Cas.) 85 (1831).

9 — Howell v Littlefield 211 S.C. 462, 46 SE. 2d 47 (1947).

10 Jackson v U.S. 14 F. Supp. 132 (D.C. S.C. 1936).
aff'd 89 F.2d 572 (4th Cir. 1937).
aff'd. on other grounds 302 U.S. 628 (1938).

11 — Jewell v Magwood 9 S.C. Eq. (Rich. Cas.) 113 (1833).

12 — Johnson v Johnson 235 S.C. 542, 112 S.E 2d 647 (1960).

13 — Lemon v Lemon 158 S.C. 71, 155 SE 285 (1930).

14 — Lucken v Wichman 5 S.C. 411 (1874).

15 North v Valk, Dud. (13 S.C.Eq.) 212 (1837).

16 Rodgers v Herron 226 S.C. 317, 85 S.E.2d 104 (1954).
17 Rutledge v Tunno 69 S.C. 400, 48 S.E. 297 (1904).
18 Ex parte Romans 78 S.C. 210, 58 S.E. 614 (1907).

19 State v Barefoot 2 Rich. (31 S.C.L.) 209 (1845).

20 State v Britton 4 McC (15 S.C.L.) 256 (1827).

21 State v Hilton 3 Rich (37 S.C.L.) 434 (1827).
22 State v Still 68 S.C. 37, 46 S.E. 524 (1903).
23 State v Whaley 10 S.C. 500 (1878).

24 State v Ward 204 S.C. 210, 28 S.E.2d 785 (1944).

25 Stringfellow v Scott 9 S.C. Eq. (Rich. Cas.) 109 (1833).
26 Tarleton v Thompson 125 S.C. 182, 118 S.E 421 (1922
27 Tedder v Tedder 108 S.C. 271, 94 S.E. 19 (1917).
28 Tyson v Weatherly 214 S.C. 306, 52 S.E.2d 410 (1949).

Discarded:

Pooler v Smith 73 S.C. 102, 52 SE 967 (1905)
Bowers v Bowers 10 Rich (31 S.C. Eq.) 551
St James v Mickey 26 SC 270, 2 S E 130 (1887)

Common law marriage

~~[illegible]~~:

1) intent by parties only essential
    - C) present
    - D) future
    - B) to cohabit only
    - A) to marry

2) proof of intent
    - A) declarations or acknowledgements
    - B) repute
    - c) cohabitation
    - d) all evidence to be judged in light of circumstances
    - e) all is subject to rebuttal and counter-evidence

CLM

I ——— 1) intent by parties only essential

a) intent is essential because in S.C. marriage is a contract relationship.

b) intent without cohabitation is enough (dicTum).

C. present

a) intent must be that the parties AT that time become man and wife

b) but ~~no specific~~ it may not be possible, nor is it necessary, to specify a day or an hour at which the parties became man and wife.

D. future

a) promise to marry in the future, even with cohabitation following, does not make the parties man & wife.

b) but if the later intercourse is intended as the execution of the earlier promise to marry in the future, the parties are man & wife.

A. to marry

a) the intent of the parties must be that they take on the relationships of man and wife.

B. to cohabit only

a) the intent to cohabit does not suffice to make the parties man and wife, even if they do cohabit for a considerable time, and makes their relationship illicit at its inception.

b) If a relationship has begun which is illicit in its inception — either because the intent of the parties is only to cohabit, or because ~~the~~ one of the parties knowingly marries ~~while~~ during the life of a true spouse — only clear evidence of a change of intent will overcome the presumtion that the nature of the relationship remains the same.

II proof of intent

A declarations or acknowledgements

a) the usual proof of common law marriage is by public declaration —

~~b) but if there is none, the seperate or common acknowledgements~~

oral or written

b) but if there is none, the seperate or common acknowledgements of the parties, in court or to private inquiry, is evidence of the marriage.

B repute

a) if there is general belief in the community that the two are man and wife, this will be evidence of that relationship actually existing.

b) if there is division of opinion the question is for the jury.

C ~~reputable~~ cohabitation

a) cohabitation over a long period of time is evidence of marriage.

b) but the cohabitation must be open and in the nature of a husband-wife relationship.

D all evidence to be judged in light of circumstances

a) the law and custom of the area will be presumed to have been followed unless clear evidence to the contrary is given

b) re: acknowledgements

considerations of the pressure of decency & a desire for the childrens' legitimacy can temper acknowledgements of the marriage.

c) re: intent

where it appears that marriage would be prejudicial to the interests of one of the parties, clearer evidence of intent to marry will be required. (dicta)

E all is subject to rebuttal and counter-evidence

a) Evidence of marriage is conclusive unless rebutted.

b) but the burden of going foward with proof is on the party claiming the marriage.

1957

Jan. 4—Order appointing U. S. as amicus curiae and party.

Jan. 23—Defendants' answer filed.

Nov. 8—Writ of injunction issued.

Nov. 8—Opinion of three-judge court.

Nov. 8—Decree of three-judge court.

Nov. 29—Order of Associate Justice of the Supreme Court, Hugo L. Black, granting stay, filed.

In the
United States District Court for the
Middle District of Alabama, Northern Division.

Mrs. Sylvester Smith, Individually and on Behalf of Her Minor Children, Ida Elizabeth Smith, Ernestine Smith, Willie Louis Smith and Willie James Smith and on Behalf of All Other Mothers of Needy, Dependent Children Similarly Situated, Plaintiffs,

versus

Ruben K. King, Commissioner of the State Department of Pensions and Security, State of Alabama; George Wallace, Chairman, State Board of Pensions and Security, State of Alabama; James Record, Mrs. Mary Waite, William M. Clarke, Temple Coley, Grant Whiddon, Mrs. Mary Ella Reaves, Members of the State Board of Pensions and Security, State of Alabama; Mrs. Clinton S. Wilkinson, Sr., Director, Dallas County Department of Pensions and Security; Individually and in Their Official Capacities, Defendants.

Civil Action.
No. 2495-N.

COMPLAINT

(for declaratory judgment and injunctive relief).

(Filed Dec. 2, 1966.)

I.

1. This is a suit for injunctive relief authorized by Title 42, U.S.C., §1983 to be commenced by any citizen

of the United States or other persons within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of the state of rights, privileges and immunities secured by the Constitution and the laws of the United States. The rights, privileges and immunities sought herein to be redressed are those secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, by the Social Security Act, 42 U.S.C., §§601-609, and by §601 of the Civil Rights Act of 1964. This is also a suit for a declaratory judgment pursuant to Title 28, U.S.C., §2201 of rights established by the aforementioned constitutional and statutory provisions.

2. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C., 2281 since it seeks an injunction to restrain the Defendant officers of the State of Alabama from the enforcement, operation and execution of the state-wide regulation set forth in the Alabama Manual for Administration of Public Assistance, Part I, Chapter II, Section V (A) (entitled "Child Ineligible if There is a Father or Mother Substitute"), and commonly referred to as the "substitute father" regulation (a copy of which is attached hereto as Exhibit A), on the ground of the unconstitutionality of said regulation under the Constitution of the United States.

3. Jurisdiction is conferred on this Court by 28 U.S.C., §1343 (3) and (4) providing for original jurisdiction of this Court in suits authorized by 42 U.S.C., §1983; jurisdiction is further conferred on this Court by 28 U.S.C., §§2201 and 2202 relating to declaratory judgments and by 28 U.S.C., §§2281 and 2284 providing for a three-judge Court.

4. Plaintiff Sylvester Smith is an adult Negro citizen of the United States and Alabama and is the mother of

Plaintiff children, Ida Elizabeth Smith, age fourteen years; Ernestine Smith, age twelve years; Willie Louis Smith, age eleven years; Willie James Smith, age nine years. For several years prior to October 1, 1966, Plaintiff and her children had been recipients of financial assistance under the Aid to Dependent Children program (hereafter referred to as ADC) of the State of Alabama, a public assistance program authorized by Code of Alabama, Title 49, §17 and Title 42, U.S.C., §§601-609. By notice dated October 11, 1966, Plaintiff Smith and her children were removed retroactive to September 30, 1966 from the list of persons eligible to receive aid, on the ground of the "substitute father" regulation. A copy of said notice is attached hereto as Exhibit B. A few weeks prior to her termination from ADC, Plaintiff Smith had sent a letter to President Johnson complaining of the inadequate size of her welfare grant and of other Alabama welfare policies. Through an aide, the President forwarded the letter to responsible welfare officials.

5. Plaintiffs bring this action on their behalf and on behalf of all the other persons similarly situated pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure. The members of the class similarly situated are needy Negro mothers and dependent Negro children in the State of Alabama otherwise eligible for ADC in Alabama whose ADC financial assistance has been terminated or denied on the ground of the aforementioned "substitute father" regulation. The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties fairly and adequately protect the interests of the class.

6. Defendant George Wallace is Chairman of the State Board of Pensions and Security and Defendants James

Record, Mary Waite, William M. Clarke, Temple Coley, Grant Whiddon, and Mary Ella Reavis are other members of said Board. Under Code of Alabama, Title 49, §17 (5a and 38) they are responsible, in conference with the Commissioner of the State Department of Pensions and Security, for the adoption of the policies, rules and regulations of the State Department of Pensions and Security, including the "substitute father" regulation here complained of.

Defendant Ruben K. King is Commissioner of the State Department of Pensions and Security and, as noted directly above, has statutory responsibility for the adoption of the regulations here complained of. Defendant King is also responsible, under Code of Alabama, Title 49, §17 (5a and 37), for all executive and administrative duties of said State Department and for interpreting the regulation formulated by the State Board of Pensions and Security.

Defendant (Mrs.) Clinton S. Wilkinson Sr., Director of the Dallas County Department of Pensions and Security, is responsible, under the Terms of Code of Alabama, Title 49, §17 (9 and 39), for enforcing the regulations of the State Department of Pensions and Security in the County of Dallas.

7. (a) At all times hereafter mentioned, Defendants Wallace, Record, Clarke, Waite, Coley, Whiddon, Reavis and King (and their predecessors in office), in order to receive federal funds for the ADC program of the State of Alabama, have been required by the provisions of 42 U.S.C., §§601-609 to have formulated a "state plan" for ADC consistent with the provisions of the Constitution of the United States and the provisions of 42 U.S.C., §601 et seq.

(b) Said Defendants are also, under the terms of Code of Alabama, Title 49, §17(7), required to "act as the agent of the federal government . . . in the administration of any federal funds granted to the state to aid in the furtherance of any of the functions of the state department . . .," and to otherwise act as the agents of the federal government in the furtherance of the objectives of the ADC program.

(c) Federal funds, granted under the provisions of 42 U.S.C., §601 et seq., constitute the major share of ADC grants in the state of Alabama.

(d) Under the terms of Code of Alabama, Title 49, Section 17 (14), defendants are required to grant ADC financial assistance

> "on behalf of any needy child who is a dependent as defined in the Federal Social Security Act or amendments thereto who shall comply with the applicable requirements of this chapter, and who: (a) Has not sufficient income and resources from all sources to provide a reasonable subsistence compatible with decency and health; (b) who meets any one of the following residence requirements—(1) has resided within the state for one year immediately preceding the application for aid, or (2) was born within the state within one year immediately preceding the application for aid, or whose parent or other near relative (as defined in the Federal Social Security Act) with whom the child is living has resided in the state for one year immediately preceding the birth of said child; (c) has not directly or indirectly disposed of or deprived himself of any property for the purpose of qualifying for the benefits of this chapter; and (d) is not receiving any other type of public assistance for which federal matching is available.

Under the terms of 42 U.S.C., §606 (a) a "dependent child" means:

> "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary), a student regularly attending a school, college, or university, its equivalent, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;"

8. (a) In all respects, except for the "substitute father" regulation promulgated and enforced by Defendants, Plaintiffs and the members of their class are eligible for and entitled to ADC financial assistance.

(b) Plaintiff children Ida, Ernestine and Willie Louis, have not received parental support or care from their father, who has been dead since 1955. Plaintiff child Willie James has not received parental support or care from his father, who has been continuously absent for many years. All the children are living in the home of their mother, Plaintiff Sylvester Smith, and all are under the age of eighteen, are Alabama residents for more than one year, are not receiving any other type of public assistance, and have not directly or indirectly disposed of property for the purpose of qualifying for ADC assistance. The sole income of Plaintiff Smith and her children is in the sum of sixteen dollars ($16) per week paid to Plaintiff Smith for working as a waitress six days a week from 3:00 a. m. to 12:30 p. m. Said income is below the financial standards promulgated by Defendants as necessary for a subsistence compatible with decency and health.

9. (a) According to information give to Plaintiff Smith by one Mrs. Stancil, an employee agent of Defendants and "counselor" of Defendants for Plaintiff Smith, the "substitute father" of the Smith children is one Mr. Willie E. Williams. Plaintiff Smith was told by Mrs. Stancil on or about October 11, 1966, that she and her children were no longer eligible for ADC aid because Mr. Williams was the "substitute father" and that Mrs. Smith should look to Mr. Williams for support. Thereafter, by notice dated October 11, 1966 and signed by Defendant Wilkinson, Plaintiffs' ADC aid was terminated on the ground of the "substitute father" regulation. (See Exhibit B attached hereto.)

(b) Mr. Willie E. Williams has nine children of his own; he lives with his family, including his wife and eight of their nine children who are dependent upon him for support. He earns barely enough for the support of his own children through work as a heavy laborer. Mr. Williams is not now, nor was he at the time of the termination of Plaintiff Smith's ADC benefits, willing or able to support the Smith family. Mr. Williams is the father of none of the children of Plaintiff Smith.

(c) Mr. Williams has known Plaintiff Smith virtually all of her life; in the last five years, he has visited her home with some frequency. He does not live in her home. Plaintiff Sylvester Smith is not willing to discuss whether she engages in a sexual relationship with Mr. Williams.

10. Upon information and belief, the Defendants have applied their "substitute parent" regulations so as to disqualify from ADC benefits only or virtually only Negro mothers and children and not white mothers and children.

11. By promulgating, adopting and enforcing the "substitute father" regulation, and on ground of said regulation terminating and denying ADC financial assistance to Plaintiff Smith, her minor children, and all other members of her class, Defendants acting under color of State law, have unlawfully deprived Plaintiff Smith and the other members of her class of ADC financial assistance, and their constitutional rights to equal protection and due process of law, and their rights under 42 U.S.C., §§601-609 and Code of Alabama, Title 49, §17, in the following manner;

A. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of the equal protection of the ADC law by classifying them as ineligible for ADC on a thoroughly arbitrary and irrational basis, i.e., the alleged sexual relation of their mother with a man who is not their father, who owes no duty of support, is giving no support, who is not married to their mother and who is not living with them.

B. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of due process of law in that Defendants have denied them needed ADC benefits to which they are otherwise entitled by arbitrarily imposing the label "substitute father" on persons who are not their fathers, owe no duty of fatherhood to them, and are performing no duty of fathers to them.

C. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of due process of law in that Defendants have denied them needed ADC benefits on the basis of a vague and uncertain regulation which enables Defendants to pick and choose on an arbitrary and whimsical basis, those to whom ADC benefits shall be granted. The vagueness of the regulation permits Defendants to terminate aid, if they choose, in the event a recipient complains to federal authorities of their other policies, as Plaintiff Smith did.

D. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated of the equal protection of the laws in that the Defendants have applied the "substitute father" regulation in such a manner as to disqualify Negro applicants and recipients but not white applicants and recipients.

E. Defendants have deprived Plaintiff Smith and other mothers similarly situated of their right to privacy under the due process clause of the Fourteenth Amendment by, *inter alia*, placing upon Plaintiff Smith and other mothers, under the terms of the "substitute father" regulation, the burden of proving that they are not engaging in a sexual relation with a man through such means as "references" from their "ministers, neighbors, grocers".

F. Defendants, through the "substitute father" regulation, have deprived the needy dependent children of Plaintiff Smith and other mothers similarly situated of the ADC benefits to which they are clearly entitled under the express provisions of 42 U.S.C., §§601-609 and Code of Alabama, Title 49, §17.

12. Plaintiffs and the class which they represent have suffered damage to their health and well-being, the health and well-being of their children and their family life, and will continue to suffer severe and irreparable injury because of the aforesaid regulation complained of herein until said regulation is declared illegal and unconstitutional and is enjoined by this Court. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

Wherefore, plaintiffs on behalf of themselves and all others similarly situated respectfully pray:

1. That a three-judge Court be convened to determine this controversy pursuant to 28 U.S.C., §2281;

2. That this Court enter a declaratory judgment pursuant to 28 U.S.C., §2201, declaring "the substitute father" regulation of the Alabama State Board of Pensions and Security, specifically Part I, Chapter II, Subdivision V (A) of the Alabama Manual of Public Assistance Administration, void and of no effect insofar as it denies eligibility to Plaintiffs and members of their class on the ground that they have a "substitute father" as therein defined; and further declaring that said regulation is contrary to the intent of Congress in enacting the Aid for Families of Dependent Children provisions of the Social Security Act (42 U.S.C., §§601-609) and the intent of the legislature of Alabama in enacting the Aid to Dependent Children program in the Code of Alabama, Title 49, Section 17; and further declaring that said regulation is repugnant to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States; and further declaring that Defendants are required to consider the eligibility for Aid to Dependent Children of Plaintiffs and all others similarly situated without reference to said "substitute father" regulation.

3. That this Court enter a permanent injunction restraining each defendant, their successors in office, agents and employees from enforcing the "substitute father" regulation contained in Part I, Chapter 2, Sub-Division V(A) of the Manual of Public Assistance Administration, and ordering them to consider eligibility for Aid to Dependent Children of Plaintiffs and all others similarly situated without regard to said regulation, on the ground that said regulation violates the intent of Congress in en-

MOTION FOR A PRELIMINARY INJUNCTION.

(Caption Omitted.)

(Filed Dec. 16, 1966.)

Please take notice that upon the Complaint herein, Plaintiffs will move the *three-judge Court* to be convened in this case at a date and time to be determined by the Court for an Order granting Plaintiffs a Preliminary Injunction

> restoring Plaintiff SMITH and her minor children to the Aid to Dependent Children program of the State of Alabama and restraining Defendants from denying eligibility to all others similarly situated on the ground of the aforesaid "substitute father" regulation,

and for such other and further relief as may seem just and proper.

Dated: December 16, 1966.

/s/ CHARLES S. CONLEY,
315 South Bainbridge Street,
Montgomery, Alabama,

DONALD A. JELINEK,
Lawyers Constitutional Defense Committee,
31½ Franklin Street,
Selma, Albama,

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Attorneys for Plaintiffs.

CLM

I ——— 1) intent by parties only essential

a) intent is essential because in S.C. marriage is a contract relationship.

b) intent without cohabitation is enough (dictum).

C.[redacted] [redacted] present

a) intent must be that the parties AT that time become man and wife

b) but ~~no specific~~ it may not be possible, nor is it necessary, to specify a day or an hour at which the parties became man and wife.

D.[redacted] [redacted] future

[redacted] promise to marry in the future, even with cohabitation following, does not make the parties man & wife.

b) but if the later intercourse is intended as the execution of the earlier promise to marry in the future, the parties are man & wife.

A. [redacted] to marry

a) the intent of the parties must be that they take on the relationship of man and wife.

B. [redacted] to cohabit only

a) the intent to cohabit does not suffice to make the parties man and wife if they do cohabit for a considerable time, and makes their relationship illicit at its inception.

b) If a relationship has begun which is illicit in its inception — either because the intent of the parties is only to cohabit, or because ~~the~~ one of the parties knowingly marries ~~while~~ during the life of a true spouse — only clear evidence of a change of intent will overcome the presumtion that the nature of the relationship remains the same.

II proof of intent

A declarations or acknowledgements

a) the usual proof of common law marriage is by public declaration —

~~b) but if there is none, the seperate or common acknowledgements~~

oral or written

b) but if there is none, the seperate or common acknowledgements of the parties, in court or to private inquiry, is evidence of the marriage.

B repute

a) if there is general belief in the community that the two are man

and wife, this will be evidence of that relationship actually existing.
b) if there is division of opinion the question is for the jury.

C ~~repute~~ cohabitation

a) cohabitation over a long period of time is evidence of marriage.
b) but the cohabitation must be open and in the nature of a husband-wife relationship.

D all evidence to be judged in light of circumstances

a) the law and custom of the area will be presumed to have been followed unless clear evidence to the contrary is given

b) re: acknowledgements
considerations of the pressure of decency & a desire for the childrens' legitimacy can temper acknowledgements of the marriage.

c) re: intent
where it appears that marriage would be prejudicial to the interests of one of the parties, clearer evidence of intent to marry will be required. (dicta)

E all is subject to rebuttal and counter-evidence

a) Evidence of marriage is conclusive unless rebutted.

b) but the burden of going forward with proof is on the party claiming the marriage.

Common law marriage

[redacted]:

1) intent by parties only essential
    - A) present
    - B) future
    - D) to cohabit only
    - C) to marry
2) proof of intent
    - A) declarations or acknowledgements
    - B) repute
    - c) cohabitation
    - d) all evidence to be judged in light of circumstances
    - e) all is subject to rebuttal and counter-evidence

i

State v Barefoot 2 [redacted] Rich. Law 209 (1845).

If a man remarries when he is legally married to another, still alive, the result is bigamy & no marriage at all.

Jewell v Magwood 9 S.C. Eq. (Rich. Cas.) 113 (1833).

114 Where parties agree to marry in future, and afterwards cohabit, the law infers that this cohabitation was an execution of the previous agreement.

SAME AS

(Fryer v Fryer @ 97 – If an agreement be made by words in futuro, that the parties will marry; and that the act of their coming together, shall, per se, signify that they have thereby concluded their contract: there the copula is a performance of the contract, and by perfecting reduces it from an executory into an executed agreement.)

114 jury question

3

State v. Britton 4 McC 256 (1827).

Conviction for bigamy when his first marriage was shown by

1) declarations by the accused

2) proof of cohabitation for 14 years.

4

Lucken v Wichman 5 S.C. 411 (1874).

413 On jury question & repute see Johnson v Johnson quoting Poynter on Marriage and Divorce, p 56:

415 "as marriage depends on society for protection, it is highly expedient that its existence should be unequivocally demonstrated."

3

STATE v HILTON 3 Rich (S.C.L.) 434 (1827)

[redacted] The marriage ceremony need not be proven by eye-witness account for the courts to recognize marriage. Uncontradicted evidence of declarations of the parties & of their cohabitation, ~~will~~ [redacted] are proper evidence that a marriage exists.

The opposite holding in England is not applicable to our situation. There the marriage is regulated by law & almost all are recorded. Here there are a variety of religious ~~[illegible]~~ ceremonies possible & few involve recording. Much of our population has immigrated from other states or other countries. Serious results would follow upon a rule that cohabitation & repute would not be evidence of the relationship.

Jackson v U.S. 14 F Supp 132 (D.C.S.C. 1936)
aff'd 89 F 2d 572 (4th Cir. 1937)
aff'd on other grounds 302 U.S. 628 (1938).

Jake Jackson lived with a woman whom he
had not ceremonially married. He stayed
in her house, ~~but for one brief return to~~
~~his sister's home~~. The woman retained her
@ 132 maiden name, but named the son she
bore ~~him~~ ~~aft~~ Jackson. They lived openly
as husband + wife + child + were recognized
as such in the community.

When Jackson entered the Army, however, he
said that he was unmarried + his closest
relative was a sister.

→ Under S.C. law, "continuance of illicit
@ 133 relations between a man and a woman
cannot of themselves ripen into marriage"
but
"declarations + manner of the parties, following
a period of concubinage, may be liberally
construed to create a state of marriage
in support of legitimacy of offspring, + of
rights arising under the laws of dower + of
inheritance."

– the jury found marriage.

STATE v WARD 204 S.C 210, 28 SE2d 785
(1944)

Fred Ward was convicted of rape. The S Ct. found error in the trial judge's
1 refussal to allow evidence ~~of common law,~~ "tending to show a common
787 law marriage" affect the question of rape:

1 1) Ward & pros'x agreed to be h & w before the intercourse

786 2) Ward introduced her to his family, the minister of his church, his sister's family, neighbors as his wife & she at no time contradicted him.

3) After the first of the declarations, the lived as man & wife for a week before her father took her away.

Allen v Hall 2 N&McC. (11 S.C.L.) 114 (1819)

"In a question, whether there has been a marriage, proof that the parties lived together, as man & wife, if not rebutted, will be conclusive. But this evidence is only presumptive, and like many other presumptions, may be rebutted by circumstances or positive proof.

~~43~~116

~~It does not follow~~ Declarations of marriage should not be conclusive. "The time, place, manner, and an infinity of other circumstances will have their weight in determining the degree of credit which will be given to them."

"If these declarations be contradictory, it will of course create doubt, and must be left to the jury to determine."

Stringfellow v Scott 9 S.C. Eq. (Rich. Cas) 109 (1833)

Question is whether man & woman married while man's true wife lived, became man & wife after true wife's death with no further ceremony.

(1) "With us, the marriage is complete, for every purpose, by the contract, without the celebration."

(2) "For a long time [over 15 years], they recognized and treated each other as man & wife... But, for aught that appears, they treated each other in the same manner during the life time of... [the true] wife, when no matrimonial connexion [sic] could exist between them."

(3) The acknowledgement in his will that she is his wife is very strong evidence that their ~~circum~~ relationship had been legitimated by their [illegible] intending to be man & wife after the 10 year absence of the true wife.

(4) But I believe that the question is one for a jury to decide whether "there was actually an agreement or understanding between them, after the death of Stringfellow's second wife, to stand together in the relation of h&w.

A) Evidence shows that the two called themselves husband & wife & cohabited as man & wife. (21)

BuT overriding is

B) This conduct might have simply been a sacrifice to decency, the two knowing, and their neighbors knowing, that they didn't consider themselves husband & wife. (21)

c) The cohabitation was immoral at its inception & there is not sufficient proof that it was ever changed.

d) The neighbors who described the relationship did so in restrained, equivocal language.

Tedder v Tedder 108 S.C. 271,
94 S.E. 19 (1917).

Question is conveyance of property. William Tedder cerem marr Jemimah Tedder + had children by her. After she died he began living with a Negro, former slave, Adeline. Upon his death, his property was left entirely to his children by Adeline

"1) The difference between marriage + concubinage in the circumstances rests in the intent of the cohabiting parties." 20

2) The intent in marriage is usually evidenced by a public and unequivocal declaration of the parties, but that is not necessary, ... it may yet rest in circumstances 20

3) As it is so contrary to the public custom that a white man should marry a Negro we will presume no such intention + ~~buder~~ burden those who allege the marriage to prove it. (The law of the state did not prohibit such marriages at that time.)
20-21

4) We find no marriage.

North v Valk, Dud. (13 S.C.Eq.) 212 (1837)

Woman began intercourse with man 2 years after the disappearance of her husband + several years before his death.
∴ beginnings were illicit.

2) There is conflicting evidence as to whether they were known as husband + wife. The better to the effect that they were not (those closest to them).

219-220

3) "There was admittedly no actual contract of marriage per verba de presenti; the only claim is based on a promise of marriage per verba de futuro followed by ~~not~~ carnal intercourse:
"When carnal intercourse follows a promise of marriage, between persons who have heretofore had no such intercourse, the presumption may be reasonable and just, that it was induced by the previous promise, and intended to be in execution of it. But how can any presumption arise, when it is only a continuation of an already subsisting intercourse?"

221

(new page)

North ~ VALK (cont'd.)

It might be of dangerous consequence, that every careless promise drawn from an infatuated man, in the course of a criminal connection, by, perhaps a
222 licentious and artful woman, should have the effect of fastening her upon him as a wife. The tendency of this, I fear, would not be in favor of purity of manners or the sanctity of marriage; but very much the contrary."

Cockrill v Calhoun 1 N&Mc (   ) 285 (1818)

287 Question of marriage is for the jury.

On appeal the weight of evidence was judged to be with the verdict of no marriage:

"The only evidence of marriage was the general opinion, arising from their living together, unaided by any positive proof of cohabitation, and her stating, in one instance, that they were married; opposed to this was her disowning the name of McConnel, his not taking upon himself the settlement of the estate of her deceased husband, and his finally leaving her, and living with another in the character of a wife, and the general opinion, (arising out of the knowledge of the whole circumstances,) that they were not married; and the provisions of the will itself might have furnished the strongest inducements to an intercourse unhallowed by the bands of matrimony."

FACTS — Woman left her husband's estate during life or widowhood, employed overseer McConnel, who lived with her for three years, during which time general belief in the neighborhood they were married [illegible] to joint declaration. After this time McC left +

4 ⑤ DAVIS v Whitlock 90 S.C. 233, 73 S.E. 171 (1911)

Defendant Araminta Whitlock appeals a judgement from the circuit court holding her marriage to Wylie S Davis null in accordance with Davis' action.

Aram had ~~I~~ married a William Whitlock, ~~she~~ and he had deserted her ~~after~~ in 1868. In 1887, ~~not~~ never having heard ~~from~~ of Whitlock again she married Davis. At the time of this marriage, she testified later, "she did not know whether Whitlock
172 was dead or alive, and that she made no inquiries about him."

Later she learned that Whitlock had been alive in 1887, & had only died in 1895.

1) ~~The fact that she made no effort~~ ~~[illegible]~~ The discovery that the true
175 husband, though absent, was still alive at the time of the second marriage voids that marriage.

2) In contrast with the case of Campbell v Campbell, 1 H.L. Sc. 182, these parties did not begin their cohabitation knowing
175 that its beginnings were adulterous.

So the fact that the courts in this country have refused to follow the House of Lords

1 in holding that adulterous cohabitation
175 can ripen into marriage simply by
the death of the adulterer's spouse,
this line of decisions ~~holding such~~
is not controlling here.
3) "When the parties have intended marriage,
being ignorant of an existing impediment,
all that is to be established by cohabitation
... subsequent to the removal of such
impediment is the carrying into effect
176 by the parties of their original purpose;"
4) but, when the original purpose was to
live in adultery, the evidence, under
similar circumstances, must be
sufficient to show an abandonment of
such purpose and the execution of
a new one."

Davis – re: Whaley –

quoting Whaley's objection to the lower decis:–

176 "That marriage, assuming the original illegality could not become the source of the legal relation of marriage through any acknowledgement of the fact of its existence."

& commenting:

"This we think all that the case decides on this subject. It is perfectly obvious, as held by the court, that no mere acknowledgement or admission by the defendant in that case or by the plaintiff in this that he had contracted a second marriage while the first was in ~~effect~~ existence could make the second marriage valid. To produce that effect, there must be, as there was ~~here~~ in this case, not only profession that the marriage relation was assumed, but the actual continuation in it after the removal of the obstacle. We are not inclined to accept any dictum of C J Willard going beyond this because we think it contrary to the reason etc.

STATE v Whaley 10 S.C. 500 (1878).

"Cohabitation having its origin in an illicit compact is presumed to continue in that character until changed by the lawful understanding of the parties into the relation of marriage."*

The conduct of parties, such as their
502 declarations and actual cohabitation, may
be proved as evidence to infer the existence
of the marriage contract. It is erroneous
to say that such delarations, accompanied
by cohabitation make the contract; they
are merely circumstances entitled to
weight with all other circumstances
properly bearing on the question, such
weight to be admitted with due regard
to the legal presumptions affecting the
question."

If the parties are incompetent to contract
marriage together, as when either is
under the age of legal consent, or previously
502 married, having a lawful husband or wife
living, the marriage is invalid and
cohabitation resulting therefrom illicit."

referring ~~back~~ To 1st quote

"Recognition of the marriage relation
by the parties is generally accepted
as ground for inferring a contract
of marriage; but if the nature
of that recognition is such that
it points exclusively to an illegal
503 transaction as the source from which
that relation has sprung, it could not
have the effect to change a state of illicit
cohabitation into the legal state of marriage.
The recognition must be of such a
nature as to point to a contract
of marriage at some time when the
parties are able to contract."

see explan in Davis v Whitlock

State v Still 68 S.C. 37, 46 S.E 524 (1903)

524 – In criminal cases marriage can be proved by evidence of cohabitation & repute.

Presumption of marriage:

Carleton v Thompson 125 S.C 182, 118 S.E 421 (1923

421 "The presumption is in favor of the marriage."

facts Wife
1) ~~Bride~~ & one other witness testified to ceremony.
2) Wife testified her children were by that man.
3) Man lived with her as wife & treated children as his own.

so

marriage & legitimacy of children presumed ~~unless~~ & burden is on the other side to show no.

Tyson v Weatherly 214 S.C. 306, 52 S.E. 2d 410 (1949),

412 – Widow of Weatherly after her death ceremonially married her stepson. Such marriages are voidable, not void, & since both are dead, the marriage will be presumed to have existed 'til their deaths unless evidence of some action brought during their lives to avoid the marriage be shown.

Rutledge v Tunno 69 SC 400, 48 SE 297 (1904).

298 - marriage is a civil contract in S.C.

298 - only present agreement of parties necessary

298 - but intercourse without agreement to be h+w makes the relationship illicit.

298 "When we know the origin of the connection to have been unlawful, the continuance of that connection can never become lawful." citing Fayer wrongly.

298 The fact may be proved by:
1) witnesses to a ceremony
2) witnesses to subsequent declarations
3) conduct + attitude of parties to the world.

In this case:
1) There were no public appearances together
2) His conveyances of real property showed no renunciation of ~~any~~ dower by her
3) The community regarded him as a bachelor.
4) His will did not single her out, but listed her among his servants.
5) She was a Negro, he white.

Cave v Cave 101 SC 40, 85 SE 244 (1915):

246 - The fact of marriage, even if legit depends on it, may be proved by repute.

246 - If the beginning of the relationship is proven to the jury to be concubinage, "the presumption of fact is that they so continued until a different mode of life is proven by the plaintiffs.

Ex parte Blizzard

185 S.C. 131, 193 SE 633 (1937)

William Blizzard lived for a time before his marriage with Lizzie Ford. Later he ceremonially married Maggie Craft. The probate judge ~~recognize~~ ~~declined~~ refused to find that Blizzard had a common law wife in Miss Ford + so found no bar to the marriage to Miss Craft.

On appeal:

1 634 1 — 1) "The party claiming common law marriage must prove the same by a preponderance of the testimony." Pooler v Smith.

1 634 — 2) "The facts & circumstances must show an intention on the part of both parties to enter into a marriage contract, and is usually evidenced by a public and unequivocal declaration by the parties." Fedder v Fedder.

634 — 3) "The courts of this state are reluctant to declare a common-law marriage unless the proof of such marriage is shown by strong and competent testimony."

see also ~~[illegible]~~ Ex parte Romans 78 S.C. 210,
58 S.E. 614 (1907).

Under the S.C. statute — 13 St. at Large, p. 291 — then applicable which read:
Cohabitation, with reputation or recognition of the parties, shall be evidence of marriage
614 in cases criminal & civil." the court held that a marriage ceremony before witnesses, but without clergy as ~~[illegible]~~ the statute ~~and~~ provided "should" solemnize such a ceremony, was valid.

1) The ceremony before witnesses
2) Publicly ~~[illegible]~~ acting as if they were married.

this was sufficient ~~that it~~ to bar a latter marriage between the husband & another woman.

H
⑩

Rodgers v Herron 226 S.C. 317, 85 SE 2d 104
(1954)

In a suit against trustee by secondary beneficiary based on trust provision that payments were to go to primary beneficiary during her widowhood, the secondary benef claiming that the primary benef had entered a valid common law marriage & so was no longer eligible for ~~pa~~ the trust payments:

1) Quoting Tedder – c l m depends on facts & circumstances evidencing intent to live together ~~as~~ husband & wife & not in concubinage.

113

2) "Such facts are often difficult of ascertainment where the intent of the parties has not been formally and publicly declared..."

3) "Somewhat analogous is the situation that exists where the issue is insanity. Circumstances may indicate insanity, but ordinarily the fact cannot be established with certainty until there is an adjudication."

Legge, Justice S. CT. of S.C.

#① #②

Howell v Littlefield, 211 S.C. 462, 46 S.E.2d 47 (1947)

In an appeal questioning the testator's marriage to Laura ~~Williams Edward~~ Berry, the point of attack was ~~a~~ her former marriage from which she had not been divorced. If that marriage was valid, the marriage to testator was not.

1) Laura Berry had undertaken to marry one Crisp in 1932. This ceremony was void because Crisp already had a wife.

2) Crisp's true wife died in 1938.

3) Did the removal of the barrier to their marriage allow ~~them to~~ their relationship to become one of common law marriage simply on the grounds of continued cohabitation?

No

1
48

1) The Crisp-Berry relationship prior to 1938 was clearly illegal.

2) Mere continuation of this relationship ~~without~~ after the barrier to legitimacy was removed did not make it legitimate,

3) There had to have been a "new, mutual agreement" that they would ~~enter a~~ live as man and wife along with the cohabitation.

also jury question 48

same as Howell

Bannister v. Bannister 150 S.C. 411, 148 SE228 (1929)

1) Where the male partner in the marriage ceremony did not marry in good faith, not having

229 been divorced from his first wife, nor having waited seven years since last seeing her, the marriage ceremony is without effect

2) Where the two parties, thus not legally married, ~~together~~ carry on their relationship after the true wifes' death, there is no ~~ma~~ common law marriage unless their status is changed "by some subsequent agreement to be husband and wife."

Lemon v Lemon 158 S.C. 71, 155 SE 285
(1930)

citing Bannister as controlling
& holding the same thing.

#② #③ Johnson v Johnson 235 S.C. 542, 112 S.E. 2d 647 (1960)

In ~~an~~ the attack on ~~a~~ Howard Johnson's will question is whether marriage of testator + Grace Clark came before or after the making of the will. ~~If before~~ If there was a valid c-l m then the marriage came before + the will survives, if no c-l m had been effected, the ceremonial marriage after the making of the will voids the will.

1) QUOTING Lucken v Wichman 5 S.C. 411 @413
"The existence of a marriage is a question of fact... If it depends on an express contract, there will be less difficulty in ascertaining the fact, for there the evidence will refer to a particular transaction.... If, however, it depends on cohabitation + repute, then the effect must be judged by a comparison of all the circumstances relied on by both sides, and even cohabitation + repute will not avail 'where the proof is clear that the parties were never married.'" 651

652 2) Any contradictory evidence as to the status of the parties ~~and is for the trier of facts to~~ makes the question one for the jury

652 trier of facts.

Fryer v Fryer 9 S.C. Eq. (Rich. Cas.) 85 1831

~~Marriage~~ Again question is testator's will. If Rachel Fryer had been married prior to her marriage to testator, then ~~the~~ she had a husband alive at their attempted marriage + it is ∴ void:

Johnston, Ch.

"Marriage, with us, so far as the law is concerned, has ever been regarded as a mere civil contract. Our law prescribes no ceremony. It requires nothing but the agreement of the parties, with an intention that THAT AGREEMENT
92 shall, per se, constitute the marriage.... It is the agreement itself, and not the form in which it is couched, which constitutes the contract. The words used, or the ceremony performed, are mere evidence of a present intention and agreement of the parties."

"There is a clear distinction between the fact, itself, of marriage, and the evidence
93 of that fact.... The acknowledgement of a marriage does not constitute the marriage, any more than the acknowledgement of any other fact constitutes that fact. It is evidence only."

retraction of the acknowledgement
And where ~~counter evidence~~ would not substantially prejudice the interests of

93 third parties, the parties involved ~~can~~ may

properly give ~~evidence~~ counter-evidence that "what they have acknowledged did not, or could not exist."

"I need hardly observe, that cohabitation and repute, which are also only evidence of marriage, will be more or less convincing, according as the cohabitation has been more or less interrupted, or the repute more or less general; and will not influence the judgement at all, if explained away or rebutted by clear proof that the parties were never married.

These two enterred no contract of marriage, but agreed to misrepresent the current facts, enter into an illicit intercourse, and marry later at a convenient time.

The declarations were intended to refer to their attempted ceremonial marriage which ~~it~~ was prevented by the absence of a minister.

This combination of intents: 1) to deceive as to past events + 2) to marry in the future bars the interpretation that they intended to be married at the time of their acknowledgements.

In judging such acknowledgements we must keep in mind ~~whether~~ that if they have been wrung from parties under a sense of shame, or extorted by a fear of ill-treatment, or odium, a sound judgement will depend less upon them than if they were made spontaneously or arose naturally.

When the parties "do not understand the
copula to be lawful, — do not intend that
it shall, per se, constitute the marriage
relation, — but, on the contrary, stipulate
97 that the marriage shall, instead of
preceding or accompanying the act, follow
it, it would never do to pronounce that
copula to be any thing else than unlawful...
"Where the character of the intercourse,
in its beginnings is ascertained, the
98 presumption is, that the intercourse is
carried on in the same character, unless
the contrary is made to appear."

ON COHABITATION & repute:

"If parties be found living together as
man and wife, without any account
or knowledge of the origin of their commerce,
100 the presumption is in favor of their having
been married.... But when we know
the origin of the connexion [sic] to have
been unlawful, the continuance of that
connexion can never become lawful.

In a case such as this, where an
illicit beginning is coupled with divided
opinion as to the repute of their following
102- cohabitation, we will not presume that
103 the parties intended to be married.
There must be clear evidence of a
change in the nature of the cohabitation
before it becomes recognized as marriage.

corollary to Howell v Littlefield

#③ #④ #⑤
Facts Tried
fund change

Campbell v Christian 235 SC 102, 110 SE2d 1 (1959)

In an appeal of a probate court ruling that a valid common law marriage had been effected between testator and co-respondent Beulah Poole Campbell before testator's ~~marriage~~ attempted marriage to appellant & ∴ that this subsequent attempt at marriage was void:

1) Testator Campbell had carried on an illicit relationships with then Beulah Poole during his first + second marriages & divorce from his second.

2) after the death of his wife – the removal of the legal barriers – Beulah Poole
   A) moved into his house
   ~~c) took the name of Campb~~
   B) went about the town with ~~him~~ as his wife
   c) took the name of Campbell
   d) named her subsequent children by him Campbell (whereas her children by him prior to this time were named Poole)

~~4)~~

3) ~~[illegible]~~ The birth certificates of the later children show ~~Both~~ Woodrow Campbell and Beulah Campbell as ~~par~~ father + mother & states that they are married.

4 The fact that Beulah Poole Campbell said she had not been married to him will not have effect if

1) it can be reasonably understood to mean they had not been ceremonially married,

2) there is evidence that after the removal of the final barrier the relationship underwent "a fundamental change" as evidenced by the "conduct and general repute of both parties over a period of many years."

"Illicit relationship, though accompanied by cohabitation, is not transformed into the legal state of marriage by mere lapse of time."

1 But

4 When a time comes that both parties are able to contract marriage, "mutual recognition of the marriage relation" will satisfy the requirements of common law marriage.

issue for jury - 4

Note, 12 SCLQ 355. (1960).

357 - agreement to marry in the future + cohabitation is not marriage unless the parties intend the intercourse to be in execution of the promise.

1

1. This is a suit for injunctive relief authorized by Title 42 USC sec. 1983 to be commenced by any citizen of the United States or other persons within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of the state of rights, privileges and immunities secured by the Constitution and the laws of the United States. The rights, Privileges and immunities sought herein to be redressed are those secured by the equal protection ~~clause of the~~ and due ~~processes~~ process clauses of the Fourteenth Amednment to the Constitution of the United States, by the Social Security Act, 42 USC secs, 601-609, and by sec. 601 of the Civil Rights Act of 1964. This is also a suit for a declaratory judgement pursuant to Title 28 USC sec. 2201 of rights established by the aforementioned constitutional and statutory provisions.

2. This is a proper case for determination by a three-judge court pursuant to 28 USC sec. 2281 since it seeks an injunction to restrain the Defendant officers of the State of South Carolina from the enforcement, operation and execution of the state-wide regulation set forth in the Policies and Prodedures in Public Assistance, (hereafter referred To as "The manual") of the South Carolina Department Wf Public Welfare, Volume IV, Chapter 2, Sec. C, 2, d., (1), (d), WAME and hereafter referred To as The "common-law relationship" regulation. on the ~~grounds~~ ground of the unconstitutionality of said regulation under the Constitution of the United States, Further, on The ground That The statute on its face, is a violation of The Social Security Act, 42 U.S.C. 601-9, and Further, on The ground That The statute as applied is a violation of sec. 601 of The Civil Rights Act of 1964.

3. Juridiction is conferred on this Court by 28 USC 1343 (3) and (4) providing for original jurisdiction of this Court in suits authorized by 42 USC sec. 1983; jurisdiction is further conferred on this Court by 28 USC secs. 2201 and 2202 relating to declaratory judgements and by 28 USC sec. 2281 and 2284 providing for a three-judge Court.

4. Plaintiffs ************** have been denied assistance provided for citizens of South Carolina under the Code of Laws of South Carolina sec. 71-11, and Title 42 USC secs. 601-609, on the basis of the South Carolina "common law relationship"regulation.

5. Plaintiffs ~~Parties~~ bring this action on their behalf and on behalf of all the other persons similarly situated pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Prodedure. The members of the class similarly situated are needy mothers and dependent children in the State of South Carolina otherwise eligible for Aid to Dependent Children payments ~~i*~~ whose financial assistance has been terminated or denied on the ground of the aforementioned "common-law relationship" regulation. The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; ~~and~~ the representative parties fairly and adequately protect the interests of the class; ~~thereby making~~ and the State of South Carolina has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

6. Defendants********** make up the South Carolina Board of Public Welfare under which ~~Whom~~ the State Department of Public Welfare operates, Code of Laws of South Carolina sec. 71-1, and which appoints the State Director of Public Welfare. Defendant*is the State Director of Public Welfare who executes the decisions and carries out the policies of the Board and who sees that the laws relating to the activities and responsibilities of the Board are obeyed, and who is the administrative head of the State Department of Public Welfare, Code of Laws of South Carolina sec. 71-5. The State Department of Public Welfare is authorized to :

1) supervise and administer the public welfare activities and functions of the state, and

2) adopt all necessary rules and regulations and formulate policies and methods of administration, when not otherwise fixed by law.

The State Department of Public Welfare has published the ~~state's~~ manual of ~~public assistance, a Policies and Prodedures in Public Assistance~~, which contains the "common-law relationship" regulation.

Defendants** make up the * County Board of Public Welfare which acts as the representative of the State in administering welfare activities within * County. CLSC sec. 71-36.

Defendant * is the County Director of * County's public assistance program, and is the chief executive officer of the county organization performing those duties assigned to him by the county board, the State Department, or law. CLSC sec. 71-34.

7. ~~a)~~ Under the Code of Laws of South Carolina sec. 71-95, the * County Department is directed to gramt aid to the families in South Carolina with "dependant children."

8. The Code of Laws of South Carolina sec. 71-91 defines "dependent child" as one under the age of eighteen years who has been deprived of parental support or care by reason of the death, continued absence from home or physical or mental incapacity of a parent and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother , stepsister, uncle, aunt, first cousin, nephew, or neice in a place of residence maintained by one or more of such relatives as his or their own home and who, if not granted aid, is likely to become a public charge or who would otherwise be deprived of proper wupport, care or training or a child under the age of ~~eighteen~~ twenty-one who is attending high school of college or regularly attending a course of vocational or technical training.

Place p. 12 here (p.5).
(statement of eligibility, but for c-l relat.)

4

10 The "common law relationship" regulation by which Pls are denied assistance is included in The ~~[illegible]~~ ~~9a) The South Carolina welfare manual, Policies and Procedures in Public Assistance~~ manual among The definitions of persons who are considered "parents" for The purposes of determining welfare eligibility: ~~includes in its definition of parent:~~

"a~~1~~) The legal father or mother; i.e. the parents are legally married, including recognized common-law marriage; and adoptive parents....

"d ~~2~~) A man who is living in common-law relationship with a woman and residing in the home with her, whether of not they are legally married by license. (The common-law relationship would set up a stepparent relationship with children not his own.)" ~~Policies and Procedures in Public Assistance,~~ ~~[illegible]~~ Manual, ~~South Carolina Department of Public Welfare~~, Vol. IV, Ch. 2, sec. C, 2, d., ~~(2), (b)~~ (1), a) and d). ~~Common-Law Relationship;~~ Definition of a Parent, p. 39.

10 b) The manual further explains ~~the term comp common law relationship as including the situation~~ that the State Department of Public Welfare has, by regulation, "adopted the policy of considering a man and woman who are living together as having established a common-law relationship and the man has the same responsibility for her and her children as though he were the legal husband." Manual, Vol. IV, Ch. 2, sec. C, 2, d., (2), (b), Common-Law ~~Marriage~~ Relationship, p.44. That is, Defendants have promulgated and enforced the statewide regulation that, for the purposes of welfare eligibility, cohabitation is to be considered common-law marriage, and ~~to~~ therefore is to place a duty on the male cohabitor to support the woman and her children as if he were the legal husband and father.

11 ~~10.~~ South Carolina statutes define the situations in which there is a legally enforceable duty to support as the following:

a) Any man who is capable of working is obliged to support his wife, his minor unmarried legitimate or illegitimate child or children dependant on him for support. Code of Laws of South Carolina, sec. 20-303.

b) ~~Section~~ The stepparent of a child is obliged to support that child provided that he knew that the child existed at the time of his marriage. Code of Laws of South Carolina, sec. 15-1231.

In either case, the law demands a legal marriage before it will require support of the children who are not ~~children of the man~~ the natural or legally adoptive children of the man.

Add 1 This To All subsequent numbers To "wheras"

12 ~~11~~ South Carolina recognizes common-law marriage, but places limitations on its formation:

~~1~~ a) Parties to any marriage must be legally free to contract marriage, otherwise the marriage is bigamous and void. Code of Laws of South Carolina, sec. 20-6.

b) Parties who have allegedly entered into a common-law marriage must have the intention to be living as man and wife before the law will recognize their marriage and give it ~~the force and protection~~ legal effect. Tedder v. Tedder, 108 S.C. 271, 94 S.E. 19 (1917).

12. South Carolina law places the burden ~~of pr~~ on the party alleging the common-law marriage to prove its existence by a preponderance of the testimony. *Ex parte Blizzard*, 185 S.C. 131, 193 S.E. 633 (1937), citing *Pooler v. Smith*, 73 S.C. 102, 52 S.E. 967 (1905).

This To page 3

9 ~~12.~~ In all respects, but for the "common-law relationship" regulation/ promulgated and enforced by Defendants, Plaintiffs ~~******~~, and the other members of their class, qualify for and are entitled to benefits under the South Carolina Aid to Dependent Children program:

a) one legal parent is absent from the home.

b) the children are in the home of a relative included in the statute,

c) all children are under 18, or are in school and under 21.

d) all have lived in the state for over a year, or have been born within a year to one who has lived in the state for over a year.

e) the income of the relative with whom they are living is below the minimum standard promulgated by Defendants as being necessary for a subsistence compatible with decency and health.

13. According to information given to Plaintiff ** by * of the State Department of Public Welfare, the common-law relationship which makes her and her children ineligible for assistance under the South Carolina Aid to Dependent Children Program involves herself and one *. Plaintiff was told that she and her children were to look to Mr.* for support, on the basis of her "common-law relationship" with him. None of her children are the natur~~##~~ al or adoptive children of Mr. *.

14. Mr. * is not legally liable for the support of Plaintiffs ****, because ~~## & ###~~*~~PLAINTIFF~~**a) he and Plaintiff * have not agreed to be, ~~######~~ and do not intedd to be living as man and wife.

b) he is legally married to * and has ___ natural children by that marriage, and is not capable of contracting any legally valid marriage in South Carolina.

15. In King v. Smith, No. 949, 36 U.S.L.W. 4703 (June 17, 1968), the Supreme Court of the United States construed 42 U.S.C. sec. 606 to ~~###~~ include in its definition of"parent"only those persons legally liable for the care and support of the child.

16. The Aid to Dependent Children programs of all states must conform to the terms of the federal statutes definigg the scope of the ~~program~~ federal social security program if those states are to receive federal ~~grants money~~ support for their programs. 42 U.S.C. 601-609.

17. Federal funds under 42 U.S.C. 601 et seq. make up a major share of Aid to Dependent Children ~~s~~ payments in South Carolina, and so, by the terms of the federal statute, South Carolina is bound by the authoritative interpretation of that statute by the United States Supreme Court.

18. Upon information and belief, the Defendants have applied their "common-law relationship" regulation so as to disqualify from Aid to Dependent Children benefits only or virtually only Negro mothers and children and not white mothers and children.

19. By promulgating, adopting and enforcing the "common-law relationship" regulation, and on ground of ~~###~~ said regulation terminating and denying Aid to Dependent Children financial assistnace ~~###~~ to Plaintiffs and all other members of their class, Defendants, acting under the color of State ~~##~~ Law, have unlawfully deprived

laintiffs and the other members of her class ~~of*rights*to~~ of their Constitutional right to [illegible] due process and The equal protection of the laws of South Carolina, contrary to the provisions of 42 U.S.C. sec. 1983, ~~and*~~further, Defendants have ~~been~~ deprived Plaintiffs, and the other members of ~~their~~ their class, of Aid to Dependent Children benefits in violation of their rights under the Federal Social Security ~~provisions~~ Act, as amended, 42 U.S.C. 601-609, and of their right to be free from racial discrimination in the determination of their eligibility for ~~a*federally~~ participation in a federally assisted program, as guaranteed by sec. 601 of the Civil Rights Act of 1964, in the following manner:

A. Defendants have deprived Plaintiff, and all others similarly situatrd, of due process of law by denying them property to which they have a ~~right~~ ~~law~~ statutory right by arbitrarily assigningthem to a status for which, according to South Carolina law, They do not [illegible] qualify. ~~according*to*the*provisions*of*South*Carolina*law*~~

B. Defendants have deprived Plaintiff~~s*needy*and*dependent*child*ren of*the~~ and all others similarly situated of due process of law by ~~shifting~~ placing the burden on them to prove that ~~theyhavenot~~ they have not entered into common law marriages, ~~with~~ despite their assertions that they do ~~not~~ not intend, and have never intended, to live as ~~a~~ man and wife, or that they are not free to contract marriage, when no compelling proof ~~to*the*con~~ of common law marriage was ~~offered*~~ presented prior to their ~~Aid*to*Dependent~~ being denied admission to or being removed from the role of those receiving Aid to Dependant Children benefits.

C. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of the equal protection of the law by arbitrarily and irrationally classifying them as ineligible for Aid to Dependent Children benefits on the ground of their mother's relationship with a man, which relationship places no ~~duty~~ legal liability for their ~~duty of*su*~~ support on said man, and leaves them deprived of the support of one parent, which deprivation is statutorily the basis of eligibility for Aid to Dependent Children benefits.

D. Defendants have deprived Plaintiff, and all others similarly ~~situated~~ situated, of the equal protection of the law by promulgating and enforcing a regulation which creates a second definition of common-law marriage in South

Carolina, ~~While~~ this definition to be applicable only to welfare recipients; while prior, the court-made definition remains applicable to all others. The basis for this distinctive classification is not related to any legitimate governmental purpose.

E. Defendants have deprived Plaintiffs and their needy and dependent children, and all others similarly situated, of ~~th~~ their rights, and of property to which they have a right, under the federal statutes defining the Aid to Dependent Children Program, 42 U.S.C. 601 et seq., as those statutes were authoritatively construed by the United States Supreme Court in the case of King v. Smith, No. 949, 36 U.S.L.W. 4703 (June 17, 1968) by ~~including~~ construing the term "parent" to include one involved in a "common law relationship" with the woman who is an ~~the~~ applicant ~~or~~ for, or recipient of, Aid to Dependent Children benefits. Here

F. Defendants have deprived Plaintiffs and their needy and dependent children, and all others similarly situated, of the equal protection of the laws by applying the "common -law relationship" regulation in such a manner as to disqualify Negro applicants and recipients but not white applicants and recipients.

G. Defendants have deprived Plaintiffs and their needy and dependent children, and all others similarly situated, of their rights to be free from racial discrimination in the determination of their eligibility for participation in a federally assisted program in violation of sec. 601 of the Civil Rights Act of 1964.

20. Plaintiffs and the class which ~~they~~ they represent ~~have~~ have suffered damage to ~~their~~ their health and well-being, the health and well-being of their children, and damage to their family life, and will continue to suffer severe and irreparable injury because of the aforesaid regulation complained of herein until said regulation ~~is~~ is declared ~~illegal and~~ unconstitutional and illegal and is enjoined by this Court. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

Wherefore, plaintiffs on behalf of themselves and all others similarly situated respectfully pray:

1. That a three-judge Court be convened to determine this controversy pursuant to 28 U.S.C. sec. 2281;

2. That this Court enter a declaratory judgment pursuant to 28 U.S.C. sec. 2201, declaring the "common law relationship" regulation of the South Carolina Department of Public Welfare, as contained in Vol. IV, Ch. 2, sec. C, 2, d., (1), (d) of the ~~Policies and Procedures in Public Assistance~~ MANUAL of that Department, void and of no effect insofar as it denies eligibility to Plaintiff, her needy and dependent children and all others similarly situated on the ground that a "common law relationship" creates a duty of parental support in the party to that relationship who has no other connection to the children or (To The relative with whom They are living) their remaining natural parent; and further declaring that said regulation is repugnant to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States; and further declaring that said regulation is contrary to the authoritative interpretation of the Social Security Act, 42 U.S.C. secs. 601-609, as handed down by the United States Supreme Court in King v. Smith, supra; and further declaring that said regulation as applied to disqualify only, or nearly only, Negro applicants and recipients of Aid to Dependent Children benefits is a violation of sec. 601 of the Civil Rights Act of 1964 in that it is a means of racially discriminating in the determination of eligibility for participation in a federally assisted program; and further declaring that Defendants are required to consider the eligibility for Aid to Dependent Children of Plaintiffs and all others similarly situated without reference to said "common-law relationship" regulation. 595-2732

3. That this Court enter a permanent injunction restraining each defendant, their successors in office, agents and employees from enforcing the "common-law relationship" regulation contained in Volume IV, Chapter 2, Section C, 2, d., (1), (d) of ~~Policies and Procedures in Public Assistance~~ The MANUAL of the South Carolina Department of Public Welfare,

10

and ordering them to consider The eligibility of Plaintiffs, etc. for Aid to Dependent Children benefits ~~of Plaintiffs~~

and her needy and dependent children and all others similarly situated without regard
and generally from doing any act or thing to carry out or enforce ~~the~~ said "common-law
to said regulation, on the ground that said regulation is repugnant to the equal
relationship" regulation,
protection and due process clauses of the Fourteenth , etc.

4. That pending the determination of the prayer for a~~n~~ permanent injunction ~~restraining each defendant, their agents and employees~~, this Court issue a preliminary ~~order of~~ injunction, restraining ~~the~~ each defendant, their successors in office, agents and employees from enforcing the "common-law relationship" regulation of the South Carolina Department of Public Welfare, and ordering them to consider ~~for~~ eligibility for Aid to Dependent Dhildren of Plaintiff and her needy and dependent children and all others similarly situated without regard to said regulation, ~~on the~~ and generally from doing any~~thing~~ act or thing to carry out or enforce ~~the~~ said "common-law relationship" regulation.

5. That pending determination of the prayer for a preliminary injunction, this Court issue, after notice to defendants, an order temporarily restraining ~~the~~ each defendant, their ~~*****~~ successors in office, agents and employees from enforcing the "common-law relationship" regulation of the South Carolina Department of Public Welfare, and ordering them to consider eligibility for Aid to Dependent Children of Plaintiff and her needy and dependent children and all others similarly situated without regard to said regulation, and ~~gen~~ generally from doing any act or thing to carry out or enforce said "common-law relationship" regulation.

6. For such other and further relief as to the Court may seem just and proper.

Dated, New York, N.Y. ~~Jul~~ August 1, 1968

Attorney for Plaintiff
~~*****~~

Number 13 June 1968

Welfare Law Bulletin

Project on Social Welfare Law
Arthur Garfield Hays Civil Liberties Program
New York University School of Law

Supreme Court Bars Denial of Aid Due to Substitute Father on Statutory Grounds

King v. Smith, No. 949, 36 U.S.L.W. 4703 (June 17, 1968); previously reported: 12 Wel. L. Bull. 3 (April, 1968), 11 Wel. L. Bull. 1 (Jan. 1968)

In a unanimous decision, the Supreme Court held Alabama's "substitute father" regulation invalid as inconsistent with Title IV of the Social Security Act. Chief Justice Warren, writing on behalf of eight justices, found it unnecessary to reach the question whether the regulation was constitutionally defective under the equal protection clause, the basis of the lower court's decision (277 F. Supp. 431 (M.D. Ala. 1967)). Mr. Justice Douglas, in a concurring opinion, would have affirmed on the ground that the regulation discriminated against children of immoral mothers in violation of the equal protection clause, citing *Levy* v. *Louisiana*, *infra* this issue, p. 3.

The Alabama "substitute father" regulation disqualifies for AFDC assistance children who would otherwise be eligible but for the fact that an able-bodied man "cohabits" with their mother in or outside her home. Alabama Manual for Administration of Public Assistance, Pt. I, C. II § VI. Pregnancy or a child under six months are considered prima facie evidence of a substitute father. The regulation places an absolute restriction on eligibility, without any inquiry as to whether the substitute father is legally obligated to support any or all of the children, whether he does in fact give support, or whether he possesses sufficient resources to contribute to their support. In justifying this disqualification, Alabama relied on Title IV, Section 406(a) of the Social Security Act, which defines a "dependent child" for purposes of eligibility as "a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent . . . ." 42 USC § 606(a). The Alabama regulation regards a man who cohabits with a woman to be the substitute father of all her children and consequently denies aid under the federal statute because the child has not been deprived of parental support.

Alabama argued that its regulation was a legitimate way of allocating the state's limited AFDC resources, asserting in support of its action two state interests: (1) to discourage illicit sexual relationships and illegitimate births, and (2) to place families with informal "marital" relationships on a par with families having ordinary marital relationships.

In considering Alabama's claims relating to regulation of morals, the Court examined the history of the Social Security Act and concluded that although such interests "would have been quite relevant at one time . . . subsequent developments clearly establish that these state interests are not presently legitimate justification for AFDC disqualification." [See Bell, *Aid to Dependent Children* (1965)]. While noting that the AFDC program when originally enacted in 1935 retained the "worthy" poor concept that derived from the mothers' pension laws of the various states, the Chief Justice observed that this concept was eventually discarded by HEW and Congress, as evidenced by HEW's Fleming Ruling of 1961 prohibiting suitable home disqualifications, and Congressional amendments to the Act providing for rehabilitative programs to improve unsuitable homes:

> Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC. In light of the Fleming Ruling and the 1961, 1962, and 1968 amendments to the Social Security Act, it is simply inconceivable, as HEW has recognized, that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children.

The Court also rejected the contention that since AFDC is denied to children of married couples who live together, children living in homes where their mothers cohabit with men to whom they are not married should be treated similarly. Chief Justice Warren rejected this argument as tenuous and as overlooking a fundamental difference in the children's legal rights to obtain support. The crucial factor is that children of mothers having informal marital relationships are deprived of any legal obligation of support from their "substitute father." Thus, it was felt that "Congress intended the term 'parent' in § 406(a) . . . to include only those persons with a *legal duty of support*" (emphasis added).

Justification for this interpretation of "parent" was found in the legislative history of the Act. When originally enacting broad legislative programs designed to counteract the Depression, Congress intended that children of unemployed fathers were to be benefited through work relief programs and the revival of private industry, which would restore a "breadwinner" to the family. Then, in order to protect a distinguishable group of children who were without such a potential "breadwinner," Congress devised the AFDC program. "To describe the sort of breadwinner that it had in mind, Congress employed the word 'parent.' 49 Stat. 629 (1939), as amended, 42 USC § 606(a)." Financial support was not the determinative factor as disqualification for AFDC was to be based on the presence of a parent, irrespective of whether he actually supported the child. Thus, the Court reasoned, "Congress must have meant by the term 'parent' an individual who owed to the child a state-imposed duty of support."

Additional corroboration for this definition of parent was found in other Title IV provisions which require states to notify law officials of deserting parents and to establish programs for locating and securing support from such parents or to establish paternity.

In considering Alabama's interest in limiting its AFDC expenditures, the Court observed that the state was empowered to set need and benefit levels. Furthermore, in determining need the state may take into account contributions actually received from a substitute parent.

While *King* v. *Smith* bars the use of a "substitute father" or "man-in-the-house" rule as an eligibility test, the Court's decision leaves open questions concerning the use of such rules as a resource test. Applicable statutes and regulations do not provide sufficient clarity. For example, under the 1967 amendments to the Social Security Act, the state plan

> shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (*living in the same home as such*

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> *child and relative*) whose needs the State determines should be considered in determining the need of the child or relative . . . 42 USC § 602(a)(7) (1968 Supp.) (emphasis added).

Also applicable are HEW regulations, which provide that in determining need a state must take into account only available and regular contributions and must not assume income (Federal Handbook, Pt. IV, § 3120).

The man-in-the-house rule, therefore, remains a subject for welfare litigation with respect to the permissible scope of a state's authority to define a substitute father and to examine his resources and determine what contribution he is making to the family.

States that will be required by *King* to restore AFDC children of deserting parents to their rolls, previously disqualified because of the substitute parent rule, will not be penalized under the freeze provisions of PL 90-248, despite the fact that the effective base period is the first quarter of 1968. Congress has recently enacted legislation postponing the freeze for one year. H.R. 15414, Tax Adjustment Act of 1968, CONG. REC. H4685, 90th Cong., 2d Sess., June 10, 1968. (See *supra* this issue, p. 6.) Although the base period remains the same, the Act provides an exception for children who began to receive aid after March 1968 as a result of a judicial decision invalidating a substitute parent or residence test. Such children will be added to the number of children who received AFDC during the first quarter of 1968, in order to determine the proportion to be applied for federal matching.

Supreme Court Bars Discrimination Against Illegitimates Under Louisiana's Wrongful Death Statute

Levy v. Louisiana, No. 508, 36 U.S.L.W. 4458 (May 20, 1968); previously reported: 11 Wel. L. Bull. 7 (Jan. 1968)

Glona v. American Guarantee and Liability Insurance Co., No. 639, 36 U.S.L.W. 4459 (May 20, 1968); previously reported: 11 Wel. L. Bull. 7 (Jan. 1968)

In the first major challenges to classifications based on illegitimacy, the Supreme Court found the denial to illegitimate children and their parents of the right to sue under the Louisiana wrongful death statute violative of the equal protection clause.

In *Levy*, the state courts had held that five illegitimate children living with their mother were not "children" within the statute, and therefore were not entitled to recover for the wrongful death of their mother. This result had been justified on the ground that "it discourages bringing children into the world out of wedlock." 192 So.2d 193, 195 (1967).

The Supreme Court reversed. For the majority of six, Mr. Justice Douglas began,

> We start from the premise that illegitimate children are not 'non-persons.' They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

Applying the test for "invidious" classification of "whether the line drawn is a rational one," see *Morey v. Doud*, 354 U.S. 457 (1957), the majority held that the discrimination against illegitimate children was invidious because "no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."

In *Glona*, the mother of an illegitimate child attempted to sue under the same Louisiana statute in a diversity action in federal court. The district court and the Court of Appeals for the Fifth Circuit rejected the claim, relying on Louisiana decisions holding that "parents" given the statutory right to sue did not include parents of illegitimates. The same majority as in *Levy* found that this classification violated equal protection. Although recognizing that *Glona* presented a slightly more difficult problem than *Levy*, since the mother had some control over the fact of illegitimacy, the majority nevertheless concluded:

> [W]e see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the "sin," which is, we are told, the historic reason for the creation of the disability.

The court dismissed the argument that granting this relief would open the courts to fraudulent claims of motherhood, viewing that problem as one of establishing the proper burden of proof.

In a single dissent for both cases, Mr. Justice Harlan (Black and Stewart concurring) held that the classifications were rational. Finding that wrongful death statutes "generally defined classes of proper plaintiffs by highly arbitrary lines based on family relationships," he could not understand why "the State must base its arbitrary definition of the plaintiff class on biological rather than legal relationships." He found two "obvious" justifications for a "legal" definition of family relationship: (1) to help enforce the general requirements of the formalities of mar-

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SOUTH CAROLINA WELFARE CASE 1968

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

OFFICE OF THE ADMINISTRATOR

June 21, 1968

TO: STATE ADMINISTRATORS

SUBJECT: Supreme Court Decision on Substitute Parent in AFDC

On June 17, 1968, the U. S. Supreme Court issued a decision (copy attached) in the case of King vs. Smith which deals with the issue of State policies making ineligible for AFDC certain children on the ground that they are not deprived of parental support or care. This decision will have applicability to the States which include in their plans "substitute parent" or "man-in-the-home" policies.

Under the court decision, eligibility of children for AFDC because of deprivation of parental support can only be determined in relation to a child's natural or adoptive parent, or a stepparent who is legally obligated to support the child. This does not mean that there is any change in the requirement that all children must meet the test of need as defined in the State plan. The State's policies with respect to establishing the need of applicants or recipients and the amount of the assistance payment must be consistent with the Federal policy regarding the consideration and application of income and the Federal policy concerning assumed income.

Attached is a copy of a regulation in tentative form, which has been signed by the Administrator and approved by the Secretary, for publication in the Federal Register. When the regulation is officially promulgated after the expiration of the 30-day notice, it will be immediately effective. Accordingly, all States who are affected by the decision are asked to start planning for the necessary revisions of their State plans so that amendments can be submitted for consideration without delay.

Our Regional Office staff will be available to work with you in the preparation of the necessary revisions.

Mary E Switzer
Administrator

Enclosures

Chapter II of Title 45 of the Code of Federal Regulations is amended by adding a new Part 203, as follows:

PART 203 - DEPRIVATION OF PARENTAL SUPPORT OR CARE

§ 203.1 Condition of plan approval; bases for determining eligibility of a child.

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

Alternatively
prop.
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AFDC
Funds

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in (a) is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State.

(c) Any State whose past policies and procedures with respect to the determination referred to in (a) have been inconsistent with the provisions in (a) or (b) must provide for making prompt written notification to all persons who have been deprived of benefits within two years prior to the effective date of the regulations in this part by reason of such inconsistent policies and procedures. Such notification must be given within 90 days to publication of these regulations and must explain clearly the rights which such persons have under the regulations.

Effective date: The regulations in this part shall be effective on the date of their publication in the Federal Register.

review records
all agency's are required
to keep record from 5 years
back.

SCHOLARSHIP,
EDUCATION AND
DEFENSE
FUND FOR
RACIAL EQUALITY inc.
164 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 532-8216

July 19, 1968

Mr. Edward Sparer
Box 455
Woodstock, New York

Dear Ed,

Enclosed is the first draft of the complaint in the South Carolina welfare case. I would appreciate your thoughts as soon as possible. At the same time, would you think it advisable to raise the issue of South Carolina's one year residency requirement as a second issue in this proceding?

We have mailed the motion in the Georgia case, and have about fifteen days to file our brief. The clerk has told us that no oral arguments will be heard on the motion.

Regards,

Carl

Contributions are deductible for income tax purposes

■ *president;* Andrew E. Norman ■ *vice presidents;* William S. Ellis, Nannette Sachs ■ *secretary;* Ezra Levin ■ *treasurer;* Shelley Appleton ■ *executive director;* Marvin Rich ■ *leadership development director;* Ronnie M. Moore ■ *legal director;* Carl Rachlin ■ *BOARD OF DIRECTORS;* Nils R. Douglas, *chairman* ■ Robert Ausnit ■ James Baldwin ■ Katrina McCormick Barnes ■ Canon James P. Breeden ■ Robert Curvin ■ Charlotte Devree ■ Robert F. Drinan, S. J. ■ John Henry Faulk ■ Michael O. Finkelstein ■ Doris Freedman ■ Dr. Edward L. Gibson ■ James T. Harris ■ Claude Heckscher ■ Norman Hill ■ Clarence B. Jones ■ Dr. Archie Lacey ■ Joann List Levinson ■ Leon Modeste ■ Henry Morgenthau, III ■ Dr. William Stuart Nelson ■ Richard J. Schwartz ■ Elaine Slater ■ Norman Thomas ■ Rowland Watts ■ Pearl L. Willen

Dear Ed,

1) Please note that paragraph 12 of the complaint is tied to sec. 601 of the Civil Rights Act of 1964, and that these two could be dropped without, as far as I can see, affecting the rest of the complaint.

2) In accord with our attempt to force the Court to come to the Constitutional question, we have dropped the arguments from the Social Security Act, and have dropped the paragraph alleging the major role of federal funds in the South Carolina program

3) We need some information still, and if you have it, or can tell us who has, we could save the time of looking further. The question is what is the maximum income allowable in the South Carolina ADC program. This refers to paragraph 10-e of the complaint.

Any suggestions or comments about these particular points, or on anything else about this draft will be appreciated.

C

3120. Interpretation

The purpose of assistance payments under the Social Security Act is to supplement the income and resources of an individual when these are inadequate to provide him an opportunity to secure for himself the State's defined standard of economic security for people in need. Under the act, State agencies have the responsibility for seeing that assistance payments are made in such amounts and in such a way as to make it possible for eligible individuals to function as responsible members of the community.

Need is the eligibility factor common to the assistance titles. A needy individual, under titles I, IV, X, XIV, and XVI, is one who does not have income and resources sufficient to assure economic security, the standard of which must be defined by each State. The act recognizes that the standard so defined depends upon the conditions existing in each State.

Under titles I, IV, X, XIV, and XVI, the condition of need must be found to exist with respect to each individual. The public assistance provisions are interpreted to permit consideration of the fact that the presence in the home of needy members of the applicant's family and other needy persons with whom he lives may be essential to his well-being and may affect his need.

A State assistance program must have a standard which is used to identify needy individuals and to establish the amount of assistance to which an individual is entitled. Since the measure of assistance is in money terms, it follows that the facts must be established as to the money amounts necessary to secure the State's defined standard. "Money amount" means an amount for each consumption item or for a group of items included in the standard. The money amount may vary with difference in cost objectively determined to exist within the State.

The act requires that all income and resources of an individual applying for assistance to be taken into consideration. 1/ This

---

1/ Except as required or permitted to be disregarded or set aside under the various titles of the Social Security Act or other Federal law.

3120. Interpretation (Continued)

necessitates a survey with the individual of the kinds and amounts of income and resources he has or believes he can secure for himself. Provision must be made that in arriving at the amount of assistance needed, the State will compare all income and resources found to be available to the individual for his use in meeting his current needs with the money amount arrived at through the application of the State-wide standard. The State has the responsibility for establishing policies with reference to potential sources of income that can be developed to a state of availability.

The income and resources clause of the respective titles is so interpreted as to support the objective of economic security for needy individuals. Such individuals are not required to be completely destitute in order to be eligible for assistance. "Consideration" of income and resources is interpreted, therefore, as permitting State-wide policies that provide for the following:

1. Definitions of the amounts of real and personal property that can be retained to meet current and future identifiable needs while assistance is received on a continuing basis; provided, that such definitions will assure that only needy individuals are eligible. The acceptable outer limits on real and personal property provisions are:

    The Home: No monetary limit required; no recovery provision required.

    Personal and Household Effects and Automobile: No monetary limit required.

    Income-Producing Property: No monetary limit required, but required that all net income be accounted for under State's policies governing income and resources or the disregard thereof. The policies may allow reasonable proportions of income from businesses or farms to be used to increase capital assets, so that income may be increased.

    Reserves: Two thousand dollars limit for individual recipient in addition to property described above.

3120. Interpretation (Continued)

2. Allocation of the individual's income as necessary for the support of his dependents not to exceed the total amount of their needs as determined by a State-wide standard;

3. Complementary program relationships that assure that no duplication exists in assistance granted by other agencies and organizations and that of the public assistance agency. Within this interpretation, State public assistance agencies may establish policy under which aid from other agencies and organizations will not be deducted in determining the amount of assistance needed from the public assistance agency. When a State adopts such policy, the fact that no duplication occurs in such cases must be assured by provision that such aid will be considered in relation to:

   (a) The different purpose for which the other agency grants aid, such as vocational rehabilitation;

   (b) The provision of goods and services that are not included in the State-wide standard of the public assistance agency, e.g., a private agency might provide money for special training for a child or for medical care when the public assistance agency does not carry this responsibility; or

   (c) The fact that public assistance funds are insufficient to meet the total amount of money determined to be needed in accordance with the State-wide standard. In such instances, grants by other agencies in an amount sufficient to make it possible for the individual to have the amount of money determined to be needed, in accordance with the public assistance agency standard, will not constitute duplication.

Availability of Income and Resources

In some States, policy has been in effect whereby income and resources, not actually available, have been assumed to be available to applicants and recipients, and have been considered so as to reduce the amount of assistance and thus the total amount actually available for meeting the essentials of living. To meet this inequity, a requirement is being added, to become effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter.

3120. Interpretation (continued)

Availability of Income and Resources (continued)

Under this requirement, a State must differentiate between resources that can be counted on because they are available for current use on a regular basis and those found not to be available for the individual's use in meeting subsistence needs as defined in the State's standard. This means taking into consideration, in determining need and amount of payment, all current income from all sources, such as earnings, OASDI monthly benefits, contributions, etc., actually available to meet the individual's needs on a regular basis (except as required or permitted to be disregarded or set aside under the various titles of the Social Security Act or other Federal law) and in contrast, omitting from consideration in determining need and amount of payment any income or resources merely assumed to be possessed by the individual.

Thus, income must not be considered where it is not, in fact, currently available to the needy individual; e.g., support payments ordered by the court but which are not, in fact, made; contributions which relatives have been determined able to make but which are not, in fact, made; and income from employment assumed to be available in the community when, in fact, the individual is not working.

For cases in which income or resources are initially available, but are then discontinued, e.g., cases in which a payment under a court order, or contributions, continue for several months and then cease, assistance payments will need to be adjusted promptly to reflect this change in circumstances.

Assistance payments must be based on need in the light of currently available income and resources. Current payments cannot be reduced because of prior overpayments, if the recipient no longer has the income available, which occasioned the overpayment. Examples: Unreported income several months ago which is no longer available as well as agency overpayments.

3121. Home Produce

Any home produce from garden, livestock and poultry utilized by the recipient and his household for their consumption (as distinguished from such produce sold or exchanged) represents resourcefulness on the part of a recipient in bettering his situation, rather than a resource to be considered in the assistance plan. Reviews have shown serious underpayments to result from inability of workers to evaluate objectively such produce. To remedy this situation, home produce for family consumption is to be considered an incentive to recipients toward self-help and may not be considered a resource in the determination of need and amount of payment.

OuTline

1) Seriousness of marriage.

14 at 415; 15 at 222

2) Burden of proof on party alleging marriage

3 at 634; (113)

a) exceptions

26 & 28

3) Elements of proof of marriage

a) eligibility to contract at beginning of relationship

Concub beginnings

2 at 229; 5 at 246; excep. 7 at 176; marr 9 at 48; 13; other 17 at 298; 19; 23 at 502; 25;

corallary 4 at 4; 10 at 133

b) present intent to live as man & wife.

8 at 92; 8 at 97; 98; 11 at 114; 15 at 221; 17 at 298; 27 at 20

16 at 113

4) Evidence of intent

8 at 92; 93; 100; 102-103; 10 at 133; 12 at 651; 16 at 113; 17 at 299; 23 at 502; 27 at 20-21; 6 at 287

a) Cohabitation

1 at 116; 4; 20; 21; 22 at 524; 24 at 786

b) Declarations

1 at 116; 3 at 634; 4; 8 at 93; 18 at 614; 20; 21; 22 at 524; 24 at 786

c) Repute

4; 5 at 246; 18 at 614;

5) Evidence of intent can be rebutted.
1 at 116; 6 at 287; 8 at 97; 27 at 21

From the earliest cases, South Carolina's courts have recognised the extreme seriousness of assigning the status of marriage to the relationship of two people who are ~~[illegible]~~ cohabiting. ~~The realisation has led the courts to demand definite evidence that~~ Early cases ~~basedm~~ spoke of the effect such a decision would have on the legitimacy of the couple's children. *Fryer v. Fryer*, 9 S.C.Eq. (Rich. Cas.) 85 (1831), *State v. Whaley*, 10 S.C. 500 (1878). As the legitimacy of the children became less consequential at law, courts broadened the rationale ~~[illegible]~~ to ~~[illegible]~~ the recognition of the special place which marriage holds both in the society generally and before the law especially. Lucken v. Wichman

What is necessary, at law to show common law marriage.

1) ~~South Carolina~~ Seriousness of marriage.

2) Burden of proof on the ~~one~~ party who alleges marriage.

— exceptions distinguished + special circumstances lead to shifting burden.

3) Elements of proof - A) eligibility

B) Intent

Present

As Man + Wife

~~Cohabitation~~

4) Evidence of intent

A) Cohabitation

B) Declaration

C) Repute

— all rebuttable + ∴ allegation of intent is rebuttable.

contract - 8 at 92, 12 at 651, 17 at 298,

25 at 109

Draft. S. Carolina

1

L

1. This is a suit for injunctive relief authorized by Title 42, USCA, SEC. 1983 to be commenced by any citizen of the United States or other persons within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of the state of rights, privileges and immunities secured by the ~~[illegible]~~ Constitution and the laws of the United States. The rights, privileges and immunities sought herein to be redressed are, those secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, by the Social Security Act, 42 USC, sec 601-609, and by sec 601 of the Civil Rights Act of 1964. This is also a suit for a declaratory judgement pursuant to Title 28, USC, sec 2201 of right established by the aforementioned constitutional and statutory provisions.

2. This is a proper case for determination by a three-judge court pursuant to 28 USC 2281 ~~2281~~ since it seeks an injunction to restrain the Defendant officers of the State of S. Carol ~~Alabama~~ from the enforcemant ,operation and execution of the state-wide regulation set forth in the Policies and Prodcdures in Public Assisstance, published by the South Carolina Department of Public Welfare, Volume IV, Chapter # 2, Sec. C, 2, d., (1),(d), on the ground of the unconstitutionality of said regulation under the Constitution of the United States.

3. Jurisdiction is conferred on this Court by 28 USC 1343 (3) and(4) providing for original jurisdiction of this Court in suets authorized by 42 USC sec. 1983; jurisdiction is further conferred on this Court by 28 USC secs, 2201 and 2202 relating to declaratory judgements and by 28USC sec 2281 and 2284 providing for a three-judge Court.

4. Plaintiff.... has been denied assistance provided for citizens of South Carolina under the Code of Laws of South Carolina sec, 71-11, and Title 42 USC secs. 601-609.... on the basis of the "common law relationship" regulation.

5. Parties bring this action on their behalf aand on behalf of all the other persons similarly situated pursuand to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Prodedure. The members of the class similarly situated are needy mothers and dependant children in the

2

State of South Carolina otherwise eligible for ADC in South Carolina whose ADC financil assistance has been terminated or denied on the ground of the aforementioned "common law relationship" regulation. The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical ot the claims of the class; and the representative ~~par~~ parties fairly and adeguately protect the interests of the class; and the State of South Carolina had acted on grounds generally applicable to the class, thereby making approriate final injunctive relief or corresponding declaratory relief ~~or corresponding declarat relief~~ with respect to the class as a whole.

6.Defendants....

South Carolina Board of Public Welfare under whom the State Department of Public Welfare operates , Code of Laws of South Carolina sec. 71-1, and who appoints the State Director of Public Welfare.

State Director of Public Welfare who executes the decisions and carries out the polcies of the Board and who sees that the laws relating to the activities and responsibilities of the Board are obeyed, and who is the administrative head of the State Department of Public Welfare. Code of Laws of South Carolina sec, 71-5. The state Department of Public Welfare is authorized to:

1) supervise and administer the public welfare activitees and funcitons of the state, and
2) adopt all necessary rules and regulations and formulate policies and methods of sdministration, when not otherwise fixed by law

3......... County Board of Public Welfare- which acts as the representattive of the State in administering welfare activities within its jurisdiction. CLSC sec. 71-36

.... County Director- chief executive officer of the county board welfare organization performing those duties assigned to him by the county board, the State Department, or law. CLSC sec. 71-34.

~~7. (a) .... (the state-level officers) have been required under 42 Usc Sec. 601-609 to make a state plan of welfare assistance conforming to the Constitution nand to the provisions of 42USC secs. 601 et seq.~~

~~(b) under sec. 71-92 the State Department is to cooperate with any Federal agency for the purpose of~~

7a)Under section 71-95 of the Code of Laws of South Carolina, the county department is directed to grant aid to the families in South Carolina with "dependent children."

b) Section 71-91 of the Code of Laws of South Carolina defines "dependent child" as one under the age of eighteen years who has been deprived of parental support of care by reason of the death, continued absence from home or physical or mental incapacity of a parent and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or neice in a place of residence maintained by one or more of such relatives as his or/their own home and who, if not granted aid, is likely to become a public charge or who would otherwise be deprived of proper support, care or training or a child under the age of twenty-one who is attending high school or college or regularly attending a course of vocational or technical training.

8.a) The South Carolina manual entitled Policies and Procedures in Public Assistance defines a parent, for the purpose of determining eligibility for Aid to Dependent Children benefits as:

1) The legal father or mother; i.e. the parents are legally married, including recognized common-law marriage; and adoptive parents....

2) A man who is living in common-law relationship with a woman and residing in the home with her, whether or not they are legally married by license. (The common law relationship would set up a stepparent relationship wo children not his own.))

Policies and Procedures in Public Assistance, South Carolina Department of Public Welfare, Vol. IV, Ch.2, sec. C, 2, d., (1), a) and d).

b) The manual explains the term "common law relationship" as encompassing the situation where a man and a woman are living together, whether or not the man is married to another woman. And while recognizing that their position was not in full accord with the law of South Carolina, Defendants have promulgated and enforced the general policy that, for purposed of welfare eligibility, cohabitation would be considered as having the same effect as common-law marrigge in placing a duty on the man to support the woman and her children. Vol IV, sec. C, 2, d., (2), (b), ~~D~~ Common-Law Reaationship

9. The pertinent sections of South Carolina law defining the responsibility to support and common-law marrigge are:

of the Code of Laws of South Carolina

a) Section ~~20-303~~ 20-303 which declares that any man who is capable of working is obliged to support his wife, his minor ~~children~~ unmarried legitimate or illegitimate child or children dependent on him for support.

b) Section 15-1231, the stepparent of a child is obliged to support that child provided that he knew that the child existed at the time of his marrigge.

c) Section 20-6 of the Code of Laws of South Carolina which declares that parties to a marriage must be free to contract marriage; otherwise the marriage is bigamous and void.

d) Tedder v. Tedder, 108 S.C. 271, 94 S.E. 19 (1917), which holds that parties to a common-law marrigge must intend to be living at the time of their cohabitation as man and wife.

10 12. Under all respects, except for the "common law relationship" regulation, ~~Plaintiff~~*********** promulgated and enforced by Defendants, Plaintiffs****** theór and the members of her class qualify for and are entitled to Aid to Dependent Children benfits.

a) one parent (legal) absent
b) all in the home of a relative
c) all under 18 or in school
d) all have lived in the state for over a tear
e) remaining relatives income is under the standard promulgated by Defendants as necessary for a subsistence compatible with decency and health.

11 13According to information given to Plaintiff********* by ********* of the State Dept. of Welfare, the common-law relationship involves herself and one ************. Plaintiff was told that she and her children were no longer eligible for Aid to Dependent Children benefits, and that on the basis of this "common-law relationship" Plaintiff was to look to Mr. *********** for support for herself and for her children, none of whom are the children of Mr. *********.

14. Mr. *********** is in no way responsible AT LAW for the support of Plaintiffs until it can be proven that he and Plaintiff ******** have entered a common-law marriage recognized by law.

? 12 ~~15~~. Upon information and belief, the Defendants have applied their "common law relationship" regulation so as to disqualify from Aid to Dependent Children benefits only or virtually ohly Negro mothers and children and not white mothers and children.

This
reference
§601 of
R.A. of 1968

13 ~~16~~.By promulgating, adopting and enforcing the "common-law relationship" regulation, and on ground of said regulation terminating and denying Aid to Dependent Children financial assistance to Plaintiffs and ~~[illegible]~~ all other members of her class, Defendants , acting under the ~~old~~ color of ~~law~~ State Law, have unlawfully deprived Plaintiffs ******** and the other members of her class of ADC financial assistance, ~~and*their rights*~~ by denying them their constitutional rights to equal protection and due process of the law, ~~and*their*rights under**42*United*States*Code*sec.~~ contrary to the provisions ~~t~~of 42 United States Code sec. 1983.

~~A. Denial of equal protection of the laws in the South Carolina Department of Welfare's order order defining common-law marriage in terms that are 1) not in accord with the law of South Carolina and 2) either with the intent intent, or with the result that, welfare recipients are denied benefits due them from a federal program of assistance~~

6

A. Defendants have denied the Plaintiffs and all others similarly situated ~~of~~ the due process of the law by denying them access to the courts and the controlling law of South Carolina in the determination of their marital status, with the intent, or with the result that Plaintiffs and all others similarly situated will be removed from or barred from the financial assistance available under Federal and South Carolina statutes, and otherwise due them.

B. Defendants have denied the Plaintiffs and all others similarly situated ~~of~~ the equal protection of the laws by acting under color of South Carolina law to create a definition of common-law maffiage applicable only ~~F~~ to recipients of Aid to Dependent Children and to applicants ~~of~~ for such aid, which definition prejudiced the rights of said recipients and applicants to the benefits otherwise due them.

In The

SUPREME COURT OF THE UNITED STATES

No._____

WILLIAM SPROWAL, Petitioner

v.

PEOPLE OF THE STATE OF NEW YORK

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable John M. Marlan, Justice of the United States and Circuit Justice for the Second Circuit:

The petitioner hereby respectfully applies for an extension of time within which to file a petiton for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in the above entitled proceeding. That judgment denying a motion for reargument was entered on July 7th, 1966 and the time in which to file such a petition will expire on October 5th, 1966. This application requests that the time be extended from October 5th, 1966 to and including November 5th, 1966.

The judgment of the Court of Appeals affirmed the judgment of the Appellate Term of the Supreme Court of the State of New York, First Department which affirmed the judgment of the Criminal Court of the City of New York, County of New York convicting the petitioner of violating Section 722-b of the Penal Law entitled "Loitering in school buildings." A copy of the order denying reargument and amending the remittitur of the Court of Appeals is attached hereto. The Court of Appeals had previously affirmed the judgment of the

Appellate Term on June 9th, 1966 (17 N.Y. 2d 884 (1966)). As the Court of Appeals affirmed without opinion, the opinion of the Appellate Term of the Supreme Court is attached. The jurisdiction of this Court rests on 28.U.S.C. §1257 (3).

This case involves the conviction of petitioner on a charge that he violated Section 722-b of the Penal Law of State of New York. The complaint charged that petitioner and four others loitered near a school in the City of New York while distributing leaflets to the students urging them to join the Congress of Racial Equality. An additional charge under Section 722 of the Penal Law ("Disorderly conduct") charging petitioner with refusing to move on when ordered to do so by a police officer was dismissed. That the constitutional arguments mentioned above were raised and past upon by the Court below appears clearly from the order amending the remittitur by the Court of Appeals for the State of New York and also in the majority opinion Tilzer J. of the Supreme Court, Appellate Term also attached.

The primary issue to be raised concerns the constitutionality of Section 722-b of the Penal Law. More specifically, petitioner will claim that the application of the statute to his peaceful conduct was in violation of the First Amendment to the Constitution of the United States. Furthermore, petitioner will claim that by interpreting the word "loitering" to make punishable his protected activity, the Court of Appeals of the State of New York rendered Section 722-b unconstitutionally vague in violation of the "due process" clause of the Fourteenth Amendment. As to the latter issue, decision of the Court of Appeals of the State of New York was in direct conflict with a decision in a similar statute by the Court of Appeals of the State of California. In re Huddleson 229 C.A. 2d 618, 40 Cal. Rptr. 581 (1964).

Counsel heretofore representing petitioner is not a member of the bar of the Supreme Court and is unfamiliar with the practice and procedure before the Court. Undersigned counsel has accordingly been employed to review the case, advise as to the reviewability of the case and preparing a petition for certiorari. Although undersigned counsel has already commenced work on the preparation of the petition, additional time for him to study the record and to examine the relevant law and the possible grounds for certiorari is necessary. This is particularly so because counsel is also presently engaged in the preparation of a brief before this Court on behalf of the petitioners in the case of Pierson, et al v. Ray, et al, No. 79, October Term, 1966. In addition counsel is also presently engaged in preparing for argument inthe case of Steele, et al v. Taft et al, No. 23125, before the United States Court of Appeals for the Fifth Circuit and in the preparation of a petition for certiorari in the case of People of the State of New York v. Herbert Callender, (affirmed by the Court of Appeals of the State of New York on July 8th, 1966). A substantial number of other matters including a brief amicus curiae in the case of Benny Parrish v. Civil Service Commission of the County of Alameda, State of California, (Supreme Court of the State of California) due September 30th, 1966 and preparation for trial as attorney for defendents in the case of People of the State of New York v. Ossela Davis and sixteen others (Criminal Court of the City of New York, County of New York) on October 3rd, 1966, inter alia demand the attention of counsel.

I am authorized by the District Attorney of New York County, by Frederick Haifetz, Assistant District Attorney, representing the People of the State of New York in this case, to say that the People of the State of New York consent to the granting of this application.

Wherefore, it is respectfully requested that the time for filing the petition be extended to and including November 5th, 1966.

Respectfully submitted,

Carl Rachlin, Esq.
150 Nassau Street
New York, New York 10038
Counsel for Petitioner

September 30, 1966

IN THE

Supreme Court of the United States

No. ....

WILLIAM SPROWAL,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

JURISDICTIONAL STATEMENT

CARL RACHLIN, Esq.
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LLOYD McAULAY, Esq.
STEPHEN M. NAGLER, Esq.
Of Counsel.

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IN THE

Supreme Court of the United States

No. ....

WILLIAM SPROWAL,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the order of the Court of Appeals of the State of New York, entered on the 7th of July, 1966, denying appellant's motion for reargument and thereby reaffirming its judgment of the 9th of June, 1966, affirming the conviction of appellant by the Criminal Court of the City of New York, County of New York. The conviction had previously been affirmed by the Supreme Court of the State of New York, Appellate Term, First Department. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The Court of Appeals of the State of New York denied appellant's motion for reargument without opinion, 18 NY 2d 690, 691 (1966), but granted appellant's motion to amend the remittitur (Appendix, p. 1a; 18 NY 2d 683 (1966)).

The Court's previous order affirming the conviction of appellant was without opinion (17 NY 2d 884, 218 N.E. 2nd 343 (1966); Appendix, pp. 3a-5a). Two judges dissented without opinion. The opinion of the Appellate Term of the Supreme Court of the State of New York, First Department is reported at 49 Misc. 2d 806, 268 NYS 2nd 444 (1966) with a dissenting opinion. These are reproduced in the Appendix at pp. 6a-21a. The conviction of appellant in the Criminal Court of the City of New York, County of New York, was without opinion.

Jurisdiction

This is an appeal from a conviction under Section 722-b of the Penal Law of the State of New York commenced by the arrest of appellant on May 29th, 1964. Appellant was convicted after trial in the Criminal Court of the City of New York, County of New York, on September 4, 1964. A Motion to Dismiss because the statute violated the First and Fourteenth Amendments, both on its face and as applied, was denied in the Criminal Court (R. 129, 130).* These arguments were rejected by the Supreme Court of the State of New York, Appellate Term, First Department (order affirming conviction and opinion entered: January 13, 1966, R. 154-170), and by the Court of Appeals of the State of New York (order affirming conviction entered: June 9, 1966; order amending remittitur and denying reargument entered: July 7, 1966). The Notice of Appeal was served and filed on October 3, 1966 in the Criminal Court of the City of New York, County of New York. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to hear this appeal: *La Crosse Tel. Corp.* v. *Wisconsin Board,* 336 U.S. 18, 69 Sup. Ct. 379 (1949); *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 Sup. Ct. 900 (1940); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 42 Sup. Ct. 106 (1921); *Cox* v. *State of Louisiana,* 379 U.S. 536, 85 Sup. Ct. 453 (1965).

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* Numbers in parentheses prefixed by "R." refer to pages of the Record used in the Court of Appeals of the State of New York.

Questions Presented

1. Whether by interpreting the term "loitering" in a section of a statute entitled "Loitering in School Buildings" in such a way as to apply the statute to one peacefully distributing First Amendment, non-commercial leaflets on a public street in the vicinity of a school, the statute has been rendered unconstitutionally vague in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the application of a "Loitering" statute to one peacefully distributing leaflets on a public street near a school was an unreasonable limitation on the right to communicate with others in violation of the First Amendment to the Constitution of the United States.

3. Whether the delegation to a public official of discretion as to who may and who may not distribute literature on a public street adjoining a public school, under the facts in this case, renders the statute void on its face in violation of the First Amendment and the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

Statute Involved

Section 722-b of the Penal Law of the State of New York; Penal Law, Consolidated Laws, c. 40, Section 722-b, provides:

> "Loitering in School Buildings.
>
> "Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

Statement

Appellant was convicted and sentenced to 60 days in the workhouse for loitering about a school building in violation of Section 722-b of the Penal Law. The People's only witness, Patrolman Raymond Gruntz, testified that on the afternoon of May 29, 1964, he was on duty at the Charles Evans Hughes High School, located on West 18th Street, between 8th and 9th Avenues in the Borough of Manhattan (R. 9). As the school was about to recess for the day, at approximately 1:10 P.M., a group, including the appellant and his four co-defendants at trial, was observed walking west toward the school (R. 9). In the words of the police officer:

> "As the group got closer, I approached them . . . and I asked—I believe it was the defendant William Sprowal—what was his purpose to be there in front of the School. He said he planned to distribute literature in front of the School, and I asked him, 'What

> type of literature?' He showed me it was connected with CORE literature.[1]
>
> "I then instructed him that it would not be permissible to hand out such literature and that if a demonstration was to start in front of the School, it is a violation of Section 722, Subdivision B, of the Penal Law, of Loitering in front of a School" (R. 9, 10).

The patrolman told them they could distribute their literature elsewhere, but not on the street on which the school is located (R. 10-12). As they stood and talked on the street, the group began distributing leaflets to students leaving the school (R. 12, 17). Sprowal continued distributing the literature as the officer repeated his order. The officer entered the school to call for assistance from the local police precinct (R. 13). When the officers arrived, the appellant and his companions were placed under arrest (R. 14, 15). One of the appellant's co-defendants (Steven Gordon) was distributing literature some distance east of the school building when he was ordered to leave the block, and upon not doing so was arrested (R. 16). At the time of the arrest Sprowal was on the public sidewalk in front of the school building. At no time did he attempt to enter the school building or grounds, all the events herein taking place on the public streets (R. 9-30).

At their trial all defendants were acquitted of a second charge[2] (R. 116) and all but the appellant and Gordon

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[1] n.b. Two leaflets were being distributed. One requested students to work with and join CORE; the other requested support for an independent board to review civilian complaints of improper police conduct (R. 139a and 139b).

[2] Section 722(3) of the Penal Law, which reads:

> "Disorderly conduct
>
> "Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned,

were acquitted on the charge of violating Section 722(b) (R. 130). On appeal to the Supreme Court of the State of New York, Appellate Term, First Department, Gordon's conviction was reversed and a new trial ordered on the ground that it was unclear from the record exactly where on the public street Gordon was standing (R. 164). Although the record does not reflect this, the charge against Gordon was subsequently dismissed on motion by the State.

How the federal question is presented.

At the trial in the Criminal Court, counsel for appellant moved to dismiss the charge on the ground that Section 722-b of the Penal Law violated the First Amendment (R. 122, 123) in that as applied the statute unreasonably restrained appellant from exercising the only reasonable method available for communicating with his intended audience (R. 122, 123) and constituted prior censorship (R. 126). Counsel further argued (R. 124, 125) that the statute was "void-for-vagueness", in violation of the due process clause of the Fourteenth Amendment. The Court rejected these arguments by stating that Section 722-b was a reasonable regulation (R. 129).

The intermediate appellate court, the Appellate Term of the Supreme Court of the State of New York, First Department, also rejected arguments based on the vagueness of the statute (R. 159 and Appendix, p. 12a) and the First

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commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: . . .

"3. Congregates with others on a public street and refuses to move on when ordered by the police; . . ."

n.b. This indicates that the Court must have found either that no breach of peace was threatened or intended or that the street was unobstructed, or both.

Amendment (R. 160 and Appendix, pp. 12a, 13a); the dissenting opinion, however, agreed with appellant (R. 166 *et seq.;* Appendix, p. 18a *et seq.*).

In amending the remittitur the N.Y. Court of Appeals also indicated its consideration of these contentions, as had the dissenting Judges Fuld and Bergan previously when they based their dissent on the dissenting opinion of Mr. Justice Hofstadter, below. See 17 NY 2d 884, 218 N.E. 2d 343 (1966).

THE QUESTIONS ARE SUBSTANTIAL

I.

The term "loiter" as used in Section 722-b exemplifies the vagueness of the term as used in such statutes particularly when applied to appellant.

In accomplishing its purpose, Section 722-b of the Penal Law, like similar statutes elsewhere, on its face condemns all persons, other than parents and those with permission, who loiter. Black's Law Dictionary (4th ed., West, 1957) defines "loiter":

> "To be dilatory; to be slow in movement; to stand around or move slowly about, to stand idly around, to spend time idly; to saunter, to delay; to idle; to linger; to lag behind."

Recognizing the word "loiter"

> " . . . does not signify anything bad or criminal except when given that significance in a criminal ordinance or statute" (*State* v. *Starr,* 57 Ariz. 270, 113 P 2d 356, 357 (1941)),

the courts of several states have interpreted the word narrowly in an effort to avoid the problem of vagueness of the statute. *State* v. *Starr, supra; In re Huddleson,* 229 C.A. 2d 618, 40 Cal. Rptr. 581 (1964). In the latter case, the court said:

> " . . . the loitering condemned . . . is not loitering in its general sense, but in its restricted and sinister sense. It includes lingering, waiting and delaying, but only for a sinister or wrongful purpose and therefore excludes such activities for a lawful purpose. . . .
>
> Therefore as we construe the statute before us, persons who merely . . . pause in the vicinity of schools or linger in the many public areas frequented by children cannot be reasonably considered as loitering within the compass of the statute. It is only when the loitering is of such a nature that from the totality of the person's actions and in the light of the prevailing circumstances, it may be reasonably concluded that it is being engaged in 'for the purpose of committing a crime as opportunity may be discovered' (*In re Cregler,* 56 Cal 2d 308, 312, 14 Cal. Rptr. 289, 363 P 2d 305 (1961)) that such conduct falls within the statute."

Other jurisdictions, however, rather than place judicial limitations on the word "loiter", have declared such statutes to be unconstitutionally vague. *Ex parte Mittelstaedt,* 164 Crim. Rep. 115, 297 S.W. 2d 153 (1957); *Soles* v. *City of Vidalia,* 92 Ga.App. 839, 90 SE 2d 249 (1955); *State* v. *Caez,* 81 N.J. Super 315, 195 A 2d 496 (1963).

In *Soles* v. *City of Vidalia, supra,* 90 SE 2d at 252, the Court said:

> "But the ordinance under attack makes no attempt to define or restrict the meaning of 'idling' or 'loitering' to conduct which would constitute a nuisance, a threat to morals, or an interference with the rights of others. . . . the courts of this state do not sanction efforts to put one 'out of circulation' because the police are unable to obtain evidence of unlawful activity with which to support their suspicions that some offense may have been committed."

The New York courts by the position taken in the present case, have chosen neither to limit the scope of the statute nor declare it unconstitutionally vague. Rather they have adopted the view formerly held in California that:

> ". . . the mere fact that some innocent people may desire to loiter near a public school does not deprive the legislature of its power to prohibit loitering at such a place if the safety of school children requires such legislative action." *Phillips* v. *Municipal Court,* 24 Cal App. 2d 453, 455, 75 P 2d 548 (1938). See also *People* v. *Johnson,* 6 NY 2d 549, 161 N.E. 2d 9 (1959).

Even if, *arguendo,* this view has merit under some circumstances and does not render the statute void-for-vagueness, when applied to the facts herein, the term "loiter" is robbed of all reason. The act for which appellant in the present case was arrested was the distribution of literature in the vicinity of a school. When considered in light of that fact, it becomes abundantly clear that Section 722-b of the Penal Law is a statute:

> ". . . so vague and indefinite in form and as interpreted, as to permit within the scope of its language the pun-

> ishment of incidents fairly within the guarantee of free speech [which] is void, on its face, as contrary to the Fourteenth Amendment." *Winters* v. *New York,* 333 US 507, 509, 68 S.Ct. 665, 667 (1948).

II.

Section 722(b) unreasonably limited appellant's First Amendment rights.

The peaceful distribution of literature on a public street is clearly within the ambit of First Amendment protection. *Lovell* v. *City of Griffin,* 303 US 444, 58 Sup.Ct. 666 (1937); *Schneider* v. *State of New Jersey,* 308 US 147, 60 Sup.Ct. 146 (1939); *Marsh* v. *State of Alabama,* 326 US 501, 66 Sup.Ct. 276 (1946); *Jamison* v. *State of Texas,* 318 US 413, 63 Sup.Ct. 669 (1943); *Hague* v. *C.I.O.,* 307 US 496, 59 Sup.Ct. 954 (1939). In *Ex parte Jackson,* 96 US 727, at 733, 24 L.Ed. 877 (1877), this Court said:

> "Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value."

The state through its police power may subject the exercise of free speech and press on its streets to reasonable regulation:

> "But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison* v. *State of Texas, supra,* 318 US at 416, 63 Sup.Ct. at 672.

Such regulation must be narrowly drawn and even-handedly administered. *Cox* v. *New Hampshire*, 312 US 569, 61 Sup. Ct. 762 (1941). There must be a reasonable relation between the end to be accomplished and the method which the statute adopts. *Stromberg* v. *People of the State of California*, 283 US 359, 369, 51 Sup.Ct. 532, 536 (1931). The obvious and proper interest of the state reflected in Section 722-b, as stated in *People* v. *Johnson, supra*, at 6 NY 2d 552 is to stop:

> " . . . the presence of unauthorized persons invading the precincts of our schools, such for instance, as dope peddlers, sex offenders, idlers, and trouble makers in general, and other persons harboring some illegitimate purpose involving the innocence of immature school children and youth." *People* v. *Johnson*, 6 NY 2d 549 at 552, 161 NE 2d 9 (1959).

The *Johnson* case involved the application of the statute to a person "hanging around" inside a school building, outside a classroom. To include the acts of appellant within the application of the term "loiter", under Section 722-b of the Penal Law of the State of New York, is neither an appropriate nor a reasonable limitation on his First Amendment rights imposed under a narrowly drawn statute. In effect this constitutes a ban on such speech. *Thornhill* v. *State of Alabama*, 310 US 88, 60 Sup.Ct. 736 (1940). Indeed, the location at which appellant was arrested and the means appellant chose to exercise his rights were the only reasonable ones through which to communicate with his intended audience (R. 122). As this Court stated in *Schneider* v. *State of New Jersey, supra*, 308 US at 163, 60 Sup.Ct. at 151, 152:

> ". . . the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

III.

A statute empowering a public official to effectively determine who may and who may not distribute literature near a school violates the First Amendment.

The Supreme Court has time and again held restraints on rights that arise out of the First Amendment to be void on their face where broad discretion is given to a state official as to who may or may not exercise these rights. Thus a licensing ordinance which forbade distribution of literature without a license was deemed void on its face in *Lovell* v. *Griffin, supra.* See also *Schneider* v. *State of New Jersey, supra; Hague* v. *C.I.O., supra; Saia* v. *New York,* 324 US 568, 68 Sup.Ct. 1148 (1948).

In January, 1965 the United States Supreme Court reversed a conviction under a Baton Rouge ordinance that was interpreted to prohibit all street assemblies and parades. *Cox* v. *State of Louisiana,* 379 US 536, 85 S.Ct. 453 (1965). There was evidence that local officials permitted certain exceptions and thus the *de facto* discretion lodged in police officials made the conviction an unconstitutional restraint. As the Court stated in *Cox* v. *Louisiana, supra,* 379 US at 557:

> The situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion

> of the local officials. The pervasive restraint on freedom of discussion by the practice of the authorities under the statute is not any less effective that (sic) a statute expressly permitting such selective enforcement.
>
> This court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. See *Saia* v. *New York, supra,* at 562. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws.

In the present case, unbridled administrative discretion was *de jure* as well as *de facto.* Accordingly, Section 722(b) is fatally defective *on its face* in permitting the person in charge of a school to grant written permission waiving the proscription.

As in the cases cited above, the discretion of the supervisory official named in the statute is "unbridled". There are no guidelines to bind the "principal, custodian or other person in charge" in making his determination as to who may loiter and who may not. Not even the words "lawful purpose" or the like, found in most statutes or engrafted thereon by courts limit his scope. See *In re Huddleson, supra; State* v. *Starr, supra;* and statutes analyzed in Lacy, "Vagrancy and Other Crimes of Personal Condition", 66 Harvard L.Rev. 1203 at 1209 (1953).

Furthermore, as noted by Mr. Justice Hofstadter in his dissenting opinion below (Appendix p. 20a, R. 169):

> ". . . [I]f distribution of literature on the street required the prior permission of the officials named in the statute, this would constitute a form of censorship in conflict with the provisions of both constitutions (citation omitted)."

The conduct of the police officer is an example of the abuse to which the statute lends itself. After the officer asked for, received and examined the handbills he told appellant that he (appellant) could not distribute "such literature". (*Infra* at 5; R. 10). As stated by Mr. Justice Black in his separate opinion in *Cox* v. *State of Louisiana, supra,* 379 US at 579, 85 S.Ct. at 469:

> "Such a statute does not provide for government by clearly defined laws but rather for government by the moment-to-moment opinion of a policeman on his beat."

CONCLUSION

It is submitted that the decision of the Court of Appeals of the State of New York renders Section 722(b) of the New York Penal Law violative of the First and Fourteenth Amendments both on its face and as applied. We believe that the questions presented by this appeal are substantiated and that they are of public importance.

Respectfully submitted,

CARL RACHLIN, Esq.
Attorney for Appellant

LLOYD MCAULAY, Esq.
STEPHEN M. NAGLER, Esq.
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SPROWAL *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 825. Decided January 23, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

THE FOLLOWING DOCUMENTS ARE THE
BEST AVAILABLE.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
No. 67 CIV 2210

WILLIAM SPROWAL,

Petitioner,

-against-

HON. GEORGE F. McGRATH, Commissioner of Correction, City of New York; FRANCIS R. BUONO, Warden, Reception and classification Center, New York City Correctional Institution for Men at Rikers Island, or any other officer having custody of the prisoner,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner's verified petition respectfully avers that:

1. The jurisdiction of this Court is invoked under 28 U.S.C. § 2241 (1958) as amended in 1964, to release petitioner from custody of repsondents in violation of the First and Fourteenth Amendments to the Constitution of the United States.

2. The petitioner, William Sprowal, is a citizen of the State of New York, and the United States restrained of his liberty in violation of the Constitution of the United States.

3. Repsondents are Hon. George F. McGrath, Commissioner, Department of Correction, City of New York, who, on information and belief exercises supervision over all correctional institutions in the City of New York and their inmates, Respondent Francis R. Buono is the Warden of the Reception and Classification Center at which petitioner ~~is~~ has been detained.

4. Petitioner was arrested on May 29th, 1964 and charged with violating § § 722-b and 722 (2) of the Penal Law of the State of New York. The latter charge (violation of § 722(2)) was subsequently dismissed. Section 722-b of the Penal Law, an

offense, reads as follows:

> "Loitering in School Buildings.
>
> " Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

5. Petitioner was convicted and sentenced to 60 days in the workhouse in the Criminal Court of the City of New York, County of New York, on or about September 4, 1964 with one co-defendant of violating § 722-b of the Penal Law. Several other co-defendants were acquitted. A copy of the minutes of trial is contained in the Record of Appeal, attached hereto as Appendix "A". Petitioner contended at trial that the statute violated the First and Fourteenth Amendments to the Constitution of the United States. These contentions were rejected.

6. On Appeal to the Supreme Court of the State of New York, Appellate Term, First Department, these contentions were duly raised and rejected (order affirming conviction and opinion entered January 13, 1966, Mr. Justice Hofstadter, dissenting). A copy of the order and opinions is included in the Record on Appeal~~s~~. THE COURT OF APPEALS of the State of New York affirmed the conviction of Petitioner without opinion (2 judges dissenting) on or about June 9, 1966. On July 7, 1966 the said Court of Appeals of the State of New York denied a motion for reargument, but amended the remittitur to show that it had passed upon petitioner's contention that the statute violated the Frist and Fourteenth Amendments of the Constitution of the United States on its face

and as applied. An Appeal to the Supreme Court of the United States was dismissed on January 23, 1967... "for want of a substantial federal question". (Hon. William O. Douglas, Justice of the Supreme Court, dissenting.)

Upon denial of a motion to resentence by Hon. Neil P. Bottiglieri, Judge of the Criminal Court of the City of New York, Petitioner surrendered to the custody of Respondents, on June 8th, 1967.

7. At the trial of Petitioner, the facts concerning his arrest emerged as follows:

The People's only witness, Patrolman Raymond Gruntz, testified that on the afternoon of May 29, 1964, he was on duty at the Charles Evans Hughes High School, located on West 18th Street, between 8th and 9th Avenues in the Borough of Manhattan (R.9). As the school was about to recess for the day, at approximately 1:10 P. M., a group, including the appellant and his four co-defendants at trial, was observed walking west toward the school (R.9).

In the words of the police officer:

"As the group got closer, I approached them... and I asked- I believe it was the defendant William Sprowal- what was his purpose to be there in front of the school. He said he planned to distribute literature in front of the School and I asked him, "What type of literature?, He showed me it was connected with CORE.

"I then instructed him that it would not be permissible to hand out such literature and that if a demonstration was to start in front of the School, it is a violation of Section 722, Subdivision B, of the Penal Law, of Loitering in front of a School" (Record p. 9,10).

The Patrolman told them they could distribute their literature elsewhere, but not on the street on which the school is located group began distributing leaflets to students leaving the school (Record pp. 12, 17). Petitioner continued distributing the literature as the officer repeated his order. The officer entered the school to call for assistance from the local police precinct (Record p.13). When the officers arrived, the appellant and his companions were placed under arrest (Record pp. 14, 15). One of the appellant's co-defendants (Steven Gordon) was distributing literature some distance east of the school building when he was ordered to leave the block, and upon not doing so was arrested (R.16). At the time of the arrest Petitioner was on the public sidewalk in front of the school building. At no time did he attempt to enter the school building or grounds, all the events herein taking place on the public streets (Record pp.9-30).

8. The conviction of Petitioner under these circumstances violated Petitioner's rights to free speech guaranteed by the First Amendment to the Constitution of the United States.

9.Section 722-b of the Penal Law the statutute under which Petitioner was convicted as exemplified by the term "loiter" as used in the statute is void for vagueness particularly when applied to Petitioner.

10. In so far as §722-b of the Penal Law empowers a public official to effectively determine who may and who may not distribute literature near a school, it violates the First Amendment to the Constitution of the United States.

11. As appears from the minutes contained in the Record on Appeal, attached hereto, the conviction of Petitioner was based on "no evidence" and so violates Petitioner's right to due process under the Fourteenth Amendment to the Constitution of the United States.

12. For the above reasons, the Criminal Court of the

City of New York lacked jurisdiction to convict the Petitioner on a charge of violating Section 722-b of the Penal Law.

13. Petitioner has exhausted all meaningful remedies available in the courts of the State of New York whereby Petitioner may terminate his unconstitutional detention without suffering irreparable injury.

14. No previous application to this court or to any federal court or judge has been made for a writ of habeas corpus.

WHEREFORE, petitioner prays the court as follows:

(a) that the writ of habeas corpus immediately issue to respondents.

(b) that the respondents be required to appear and answer in writing the allegations of this petition.

(c) that after full and complete hearing this Court relieve petitioner of the unconstitutional restraint and sentence.

(d) that the execution and service of the judgement and sentence be ordered stayed until further proceedings are had in this Court.

(e) that the Court grant such other and further relief as to the Court appears just and proper under the circumstances.

Respectfully submitted

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150 Nassau Street
New York, N.Y.

Lloyd A. McAulay
165 Broadway
New York, N.Y.

Attorneys for Petitioner

VERIFICATION

State of NEW YORK)
: SS:
County of NEW YORK)

WILLIAM SPROWAL, being duly sworn, deposes and says that he has read the foregoing petition, and that he knows the contents thereof to be true except as to such matters as are stated upon information and belief and these he verily believes to be true and that he believes he is entitled to the relief spught therein.

William Sprowal
Petitioner

Sworn to and suscribed before me this
9th day of JUNE 1967.

Charles Mushaw
Notary Public

CHARLES MUSHAW
Commissioner of Deeds
City of New York 2-1241
Cert. Filed in New York County
Commission Expires Sept. 21, 1967

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
No. 67CIV 2260

---X

WILLIAM SPROWAL,

Petitioner,

-against-

HON. GEORGE F. McGRATH, Commissioner of Correction, City of New York; FRANCIS R. BUONO, Warden, Reception and Classification Center, New York City Correctional Institution for Men at Rikers Island, or any other officer having custody of the prisoner.

Respondents.

---X

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

Petitioner presently in custody under process of the City of New York, hereby applies for a certificate that probable cause exists, pursuant to Title 28, U. S. C. §2253, for review by the United States Court of Appeals for the Second Circuit of the denial of petitioner's petition for a Writ of Habeas Corpus by the Honorable Walter R. Mansfield, Judge United States District Court for the Southern District of New York, on June 15, 1967.

It is so certified.

_______________________________J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 67 CIV 2260

WILLIAM SPROWAL,

Petitioner,

-against-

HON. GEORGE F. McGRATH, Commissioner of Correction, City of New York; FRANCIS R.BUONO, Warden, Reception and Classification Center, New York City Correctional Institution for Men at Rikers Island, or any other officer having custody of the prisoner,

Respondents.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

STEPHEN M. NAGLER, being duly sworn, deposes and says:

1. I am one of the attorneys representing the petitioner herein and am familiar with the circumstances and with the facts in this case. I make this affidavit in his stead because of the great delay involved in seeing the Petitioner at the New York City Correctional Institution for Men, Reception and Classification Center - Rikers Island and because of the need for preparing this matter for appeal without delay. All of the attorneys for petitioner are and have been representing him without compensation.

2. Petitioner is presently confined in the correctional institution named above on a sentence of 60 days, pursuant to a conviction for violation of Section 722-b of the Penal Law of the State of New York. The petitioner commenced his confinement on Thursday, June 8,1967 under circumstances more fully set out in the Petition for a Writ of Habeas Corpus.

3. Petitioner is a citizen of the United States.

4. The above entitled case came on for hearing

before the above court on the 12th day of June, 1967 and a judgement was rendered therein dismissing an order to show cause and a petition for a writ of Habeas Corpus on the 15th day of June, 1967.

5. Petitioner desires to take an appeal from the judgement to the United States Court of Appeals for the Second Circuit.

6. I believe Petitioner is entitled to the redress sought to be obtained in the action and by the appeal.

7. This is an appeal from an order entered by the Hon. Walter R. Mansfield, Judge, United States District Court, for the Southern District of New York, dismissing an Order to Show Cause and a Petition for a Writ of Habeas Corpus. The Petitioner, William Sprowal, was convicted of violating Section 722-b of the Penal Law of the State of New York which he contends is "void for vagueness" pursuant to the due process clause. Petitioner further contends that as applied the statute violates the First Amendment to the Constitution of the United States.

8. Because of ~~the~~ his poverty he is unable to pay the costs of appeal or to print the record or to give security therefor and still be able to provide himself and his dependents with the necessities of life.

9. There is no person interested by contract or otherwise in the appeal or entitled to share in any recovery thereunder, who is able to pay or secure the costs.

10. This affidavit is made for the purpose of availing the petitioner of the rights and privileges in such case provided by section 1915 of Title 28 of the United States Code.

11. Unless he is permitted to proceed in forma

pauperis for a review in the United States Court of Appeals for the Second Circuit, of the above entitled case, he will be utterly unable to secure his rights.

Wherefore petitioner prays that he may have leave to prosecute his appeal in forma pauperis pursuant to statute.

Stephen M. Nagler
STEPHEN M. NAGLER

Sworn to before me this 16 ,day
of June 1967.

LAWRENCE H. ROBBINS
NOTARY PUBLIC, State of New York
No. 60-[illegible]
Qualified in Westchester County
Certs. filed with N. Y. Co. Clerk & Reg.
Commission Expires March 30, 196

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 67 CIV 2260

WILLIAM SPROWAL,

Petitioner- Appellant,

-against-

HON. GEORGE F. McGRATH, Commissioner of Correction, City of New York; FRANCIS R. BUONO, Warden, Reception & Classification Center, New York City Correctional Institution For Men - Rikers Island, or any other officer having custody of the prisoner,

Respondents- Appellees.

NOTICE OF APPEAL

Sir:

PLEASE TAKE NOTICE that William Sprowal, the Petitioner herein, hereby appeals to the United States Court of Appeals, Second Judicial Circuit, from the order made in this proceeding by Hon. Walter R. Mansfield, Judge of this court, on the 15th day of June, 1967, and entered in the office of the clerk of the United States District Court for the Southern District of New York, on the 15th day of June, 1967, denying the Petitioner's petition for a writ of habeas corpus for his release from the custody of Respondents, and dismissing an order to show cause.

Dated: New York, New York
June 16, 1967

Yours, etc.,

Carl Rachlin
Stephen M. Nagler
150 Nassau Street
New York, New York 10038

Lloyd McAulay
165 Broadway
New York, New York

ATTORNEYS FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 67 CIV 2260

WILLIAM SPROWAL,
Petitioner,

-against-

HON. GEORGE F. McGRATH, Commissioner of Correction, City of New
New York; FRANCIS R. BUONO, Warden, Reception & Classification
Center, New York City Correctional Institution For Men -
Rikers Island, or any other officer having custody of the
prisoner,

Respondents.

BOND

An order having been entered on the 19th day of June, 1967 by the HONORABLE WALTER R. MANSFIELD, a Judge of this Court, that the above named petitioner, WILLIAM SPROWAL, be admitted to bail in the amount of Five-Hundred ($500.00) Dollars, pending the determination of an appeal to be filed herein in the United States Court of Appeals for the Second Circuit by the petitioner from an order dated June 15, 1967 dismissing the above captioned petition for a writ of habeas corpus, and the Stuyvesant Insurance Company having submitted a bond or undertaking as surety, in the sum of Five-Hundred ($500.00) Dollars acceptable to the Clerk of the United States District Court for the Southern District of New York.

NOW, THEREFORE, the Stuyvesant Insurance Company does hereby undertake that the above named petitioner, William Sprowal shall in the event the judgment appealed from shall be affirmed by the United States Court of Appeals, then and in that event, the said William Sprowal shall comply with the terms of such order as may be entered by the United States Court of Appeals for the Second Circuit, and in the event that the order so requires, shall surrender himself to the Warden of the Reception &Classification Center, New York City Correctional Institution For Men - Rikers Island, and generally appear and render himself amenable to any subsequent order of the United States Court of Appeals for the Second Circuit as well as the United States District Court for the Southern District of New York as directed by that Court, or appear and render himself amenable to the courts of the City and/or State of New York as required by law; and

THE UNDERSIGNED, does hereby stipulate, consent and agree that in the event the petitioner, William Sprowal, does not comply with the terms of such order as may be entered by the United States Court of Appeals for the Second Circuit on such appeal, that then and in that event the bond or undertaking in the sum of Five-Hundred ($500.00) Dollars submitted by the Stuyvesant Insurance Company as aforesaid, shall be forfeited to the State of New York.

STUYVESANT INSURANCE COMPANY

By /S/ CARMINE J. PEPE
Attorney in fact

ACKNOWLEDGMENT

STATE OF NEW YORK)
COUNTY OF NEW YORK)

On this 21st day of June, 1967, before the undersigned, personally appeared ____________________ known to me to be the person who is described in and executed the foregoing instrument, and acknowledged to me that he is Attorney in Fact for the Stuyvesant Insurance Company and that he executed the same.

____

APPROVED AS TO FORM: ____________________, Ass't. District Att

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 67 ClV 2260

---X

WILLIAM SPROWAL,

Petitioner,

-against-

HON. GEORGE F. McGRATH, Commissioner of Correction, City of New York;FRANCIS R. BUONO, Warden, Reception and Claddification Center, New York City Correctional Institution for Men at Rikers Island, or any other officers having custody of the prisoner,

Respondents.

---X

AFFIDAVIT

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

WILLIAM SPROWAL, BEING DULY SWORN,deposes and says:

1. I am the petitioner in the above entitled case.

2. This affidavit is offered in support of a motion previously presented to Hon. Walter B. Mansfield, Judge, United States District Court for the Southern District of New York, for leave to appeal as a poor person.

3. As set out more fully below, I am indigent.

4. I am presently employed as a Labor organizer for local 1199, Drug & Hospital Employees Union, AFL-CIO. I am paid $133.00 per week. I have 6 dependents. I support my former wife's two children who live with me. I also support my wife and her two children.

5. I live in an apartment in which the rental is $87.00 per month.

6. I have $103.00 in a savings account. I have no checking account.

7. I am making monthly payments of $60 on a loan of $400.00 of which I am still in debt for $240.00 .

8. I own no securities, stocks or bonds of any sort whatsoever.

9. I do not own a car.

10. I own no real property whatsoever.

11. My personal possessions consisting of used clothing, furniture and personal effects are of the value of approximately $800.00.

12. I have no other income or property than that mentioned above

13. I am represented in the present Habeas Corpus proceding by Carl Rachlin, Esq. and Stephen M. Nagler, Esq. who have agreed to represent me without fee or other compensation.

14. No previous application has been made for the relief requested herein.

WHEREFORE, I respectfully pray that I be allowed to proceed and prosecute an appeal in forna pauperis.

Sworn to before me this

10th day of August, 1967.

LAWRENCE H. ROBBINS
NOTARY PUBLIC, State of New York
No. 60-8592600
Qualified in Westchester County
Certs. filed with N. Y. Co. Clerk & Reg.
Commission Expires March 30, 196

William Sprowal
William Sprowal

CHILE BOND

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 67 CIV 2260

WILLIAM SPROWAL,

Petitioner,

-against-

HON. GEORGE F. McGRATH, Commissioner of Correction, City of New York; FRANCIS R. BUONO, Warden, Reception and Classification Center, New York City Correctional Institution for Man at Rikers Island, or any other officer having custody of the prisoner,

Respondents.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED:

That the time in which the petitioner may file a Notice of Appeal, and/or petitioner for reargument of the dismissal of his petitioner for a writ of habeas corpus shall be extended to and including September 10th, 1967.

DATED: NEW YORK, NEW YORK
AUGUST 21st, 1967

FRANK HOGAN, ESQ.
District Attorney
New York County
155 Leonard Street
New York, New York 10013
Attorney for Respondents

BY: Frederick P. Hafetz
FREDERICK P. HAFETZ
Assistant District Attorney

CARL RACHLIN, ESQ.
150 Nassau St. (Rm. 1030)
New York, N.Y. 10038
Attorney for Petitioner
BY: Stephen M. Nagler
STEPHEN M. NAGLER

SO ORDERED: ______________________

No. 67 CIV 2260

---X

WILLIAM SPROWAL,

Petitioner,

-against-

HON. GEORGE F. McGRATH, Commissioner of Correction, City of New York; FRANCIS R. BUONO, Warden, Reception and Classification Center, New York City Correctional Institutinn for Men at Rikers Island, or any other officers having custody of the prisoner.

Respondents.

---X

AFFIDAVIT

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

STEPHEN M. NAGLER, ESQ., BEING DULY SWORN, deposes and says:

1. I am an attorney admitted to practice in the State of New York.

2. I am one of the attornys who is and has represented the petitioner during the pending of this proceeding. I am charged with primary responsibility for the administration of this case and have appeared herein by leave of this honorable court.

3. On June 15, 1967 an order was entered by Hon. Walter R. Mansfield, Judge, United States District Court for the Southern District of New York, denying writ of habeas corpus.

5. Since that time, except for a certificate of probable cause submitted to the Hon. Walter R. Mansfield, Judge, United States District Court for the Southern District of New YOrk, which has not been signed, causel for petitioner has under no effort to prosecute the appeal or apply for rehearing.

6. The reasons for this failure have been many. None of these reasons, however, deal with the writs of the case. For a period of two weeks, from June 23rd, 1967 to July 10th, 1967 I was away from New York on vacation. For approximately one week thereafter, I was absent from my office due to illness. During this period, other associated with me in this case were absent from New York. On returning to my duties, it was necessary for me to attend to numerous matters, many of them dire emergencies. The matters with which I have

[illegible] pending in the United States District Court for the Southern District Court for the Southern District of New York); People, etc., v. Pegues, People, etc., v. Turner, Gest and Pearson, People v. Callender, and People v. Lucas (all of the cases pending in the Criminal Court of the City of New York); People, etc. v. Brown (City Court, City of Mount Vernon); People, etc. v. Stuyvesant Insurance Co., exrel Elaine Bibuld (Supreme Court of the State of New York, County of New York); and not less than twelve administrative proceedings before the New York State Department of Social Welfare.

7. Furthermore due to vacations, and a general limitation of the availability of resources during this period, I have found it physically impossible to draft the necessary papers for either an appeal or reargument in the present case.

8. No previous application for an extension of time has been made.

Wherefore, I respectfully request that the time to file a Notice of Appeal and/or petition for reargument be extended to September 10, 1967 inclusive.

Stephen M. Nagler
STEPHEN M. NAGLER

Sworn to before me
this 22nd day of August, 1967

RUBIN G. SEMERDOFF
Notary Public, State of New York
Qualified in Bronx County
No. 03-8918275
Commission Expires March 30, 1968

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
No. 67 CIV ~~2260~~

WILLIAM SPROWAL, Use Bradley caption.

Petitioner

-against-

HON. GEORGE F. McGRATH, Commissioner of Correction, City of New York; FRANCIS R. BUONO, Warden, Reception and Classification Center, New York City Correctional Institution for Men at Rikers Island, or any other officer having custody of the prisoner,

Respondents .

ORDER GRANTING LEAVE TO ~~APPEAL~~ PROCEED IN FORMA PAUPERIS

This cause coming on to be heard upon the application of ~~WILLIAM SPROWAL~~ SYNESTER BRADLEY to be allowed to prosecute ~~his appeal herein~~ the above entitled action in formal pauperis, based upon the affidavit of Stephen M. Nagler, verified the ~~16th~~ 3rd day of ~~June~~ November, 1967, filed in accordance with the provisions of Title 28, United States Code, section 1915, it is hereby

ORDERED, ADJUDGED AND DECREED that ~~WILLIAM SPROWAL~~ SYNESTER BRADLEY be allowed to prosecute ~~his appeal~~ the above entitled action in ~~the above-entitled cause to the~~ the United States ~~Court of Appeals~~ District Court for the ~~Second Circuit~~ Southern District of New York, and in any appeal therein, without being required to prepay fees or costs or give security therefor because of ~~his~~ her poverty as alleged in the affidavit, and it is further

ORDERED that stenographic transcripts or printed records of any proceedings had herein including examinations before trial be made available to the Plaintiff at the expense of the United States and that the office of the ~~[illegible]~~ Stenographer of this Court is directed to make such services available for any examinations before trial and it is further

~~District Judge~~

ORDERED that the Clerk file her motion and that the marshall shall serve such processes as may be appropriate without requiring payment or security for costs.

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
No. 67 CIU 2260

WILLIAM SPROWAL,

Petitioner

-against-

HON. GEORGE F. McGRATH, Comissioner of Correction, City of New York;
FRANCIS R. BUONO, Warden, Reception and Classification Center,
New York City Correctional Institution for Men at Rikers Island,
or any other officer having custody of the prisoner.

Respondents,

ORDER TO SHOW CAUSE

Good cause appearing upon reading the petition on file herein, it is

Ordered that Respondents appear before this court on the ______ day of _______, 1967, at the hour of ______ o'c lock of that day, to show cause, if any he has why a writ of habeas corpus should not issue herein as prayed, and that a copy of this order be served upon him. It is further ordered that the petitioner remain in custody and within the jurisdiction of this court until its further order herein.

____
U. S. D. J.

Dated: __________, 1967.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

December 15, 1966

Carl Rachlin, Esquire
General Counsel
150 Nassau Street
New York, N. Y. 10038

Re: Sprowal v. New York
No. 825, O. T. 1966

filing

Dear Sir:

Receipt is acknowledged of your letter of December 12th enclosing an order for the entry of appearance of counsel in the above-entitled case.

The state has until January 2nd to file a motion to dismiss or affirm. If you wish to file, you have until January 22nd to oppose. No action will be taken until that time has expired.

Very truly yours,

John F. Davis, Clerk

By

E. P. Cullinan
Chief Deputy

EPC:lsr

WIRIN, RISSMAN, OKRAND & POSNER
LAWYERS
257 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

A. L. WIRIN
FRED OKRAND
ROBERT R. RISSMAN
PAUL M. POSNER
LAURENCE R. SPERBER

TELEPHONE
MADISON 4-9708

December 23, 1966

Carl Rachlin, Esq.
150 Nassau Street
New York, New York 10038

Dear Mr. Rachlin:

I would very much appreciate receiving a copy of your jurisdictional statement in Sprowal v. New York, No. 825, October Term 1966, U. S. Supreme Court.

Our very best wishes to you for the holiday season and the new year.

Sincerely yours,

Fred Okrand
Fred Okrand

FO:cp

Dear Fred
Enclosed is a copy of our Sprowal petition. I expect to be in Los Angeles on Jan 6-8, care of Operation Bootstrap on Central Ave. Will I see you, ~~Larry~~ Al and Larry. Sincerely

STEELE, ROCHELLE et.al. VS. Taft, George, B. et al. MAYOR of TALLAHASSEE, FLA.
(CLOSING OF TALLAHASSEE SWIMMING POOLS RATHER THAN INTEGRATING THEM)

[illegible]

[illegible]

COURT OF [illegible]

FIFTH CIRCUIT

No. [illegible]

ROCHELLE [illegible], ET AL.,

versus

GEORGE [illegible], ET AL.,

Appeal from the United [illegible]
Northern [illegible]

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROCHELLE STEELE, DARRYL STEELE, both
minors by Reverend C. K. Steele,
their father and next friend,

CIVIL CAUSE
NO. 1073

and

SADIE ESTELLE GORDON,

Individually and as representatives
of a class

(Filed: May
21, 1965)

Plaintiffs

VS.

GEORGE B. TAFT, Mayor of the City of
Tallahassee, and Commissioner
of the City of Tallahassee, State
of Florida

and

ARVAH HOPKINS, City Manager, City of
Tallahassee, State of Florida

and

HUGH WILLIAMS, Commissioner of the City
of Tallahassee;
JOE CORDELL, Commissioner of the City
of Tallahassee;
DAVID ATKINSON, Commissioner of the City
of Tallahassee;
WILLIAM H. CATES, Commissioner of the City
of Tallahassee, State of Florida

and

FRANK STOUTAMIRE, Chief of Police of the
City of Tallahassee, State of Florida

and

RECREATION BOARD, City of Tallahassee;
JAMES HARDAWAY, RECREATION DIRECTOR, City of
Tallahassee;
LESLIE ABSTEIN, ROY BERRY, DR. T.J. BIXLER,
W. P. STILL, and BILLY OWENS, members
of the RECREATION BOARD, City of
Tallahassee

MAX HUMPHREY, Chairman, Park Board of the
City of Tallahassee
MRS. D. FRED MC MULLEN, and MRS. ERNEST W.
CARSON, members of the Park Board,
City of Tallahassee, State of
Florida

and

WADE WEHUNT, Department Head, Swimming Pools,
an employee of the CIVIL DEFENSE
DEPARTMENT, City of Tallahassee,
State of Florida

Defendants

COMPLAINT

I

Jurisdiction of this court is invoked under the Fourteenth Amendment to the United States Constitution and Title 28, United States Code, § 1331 (a), 1343 (3), and 1343 (4), 1357, 2201, 2202, 2281, Title 42, United States Code, § 1981, 1983, 1985 ( ) and 1988.

II

The matter in controversy exceeds the sum of ten thousand dollars ($10,000.00), exclusive of interests and costs.

III

Plaintiffs bring this action on their behalf and on behalf of others similarly situated pursuant to rule 23 (2) (3) of the Federal Rules of Civil Procedure. There are common questions of law and facts affecting the right of other Negro persons who are deprived of or threatened with the loss of their right of the equal protection of the laws, on account of their race and color by being denied equal utilization of public facilities which are owned, operated, or managed by or on behalf of the state or subdivision thereof, who are so numerous as to make it impractical to bring them all before this court. A common relief is sought. The interest of said class are adequately represented by the plaintiffs.

IV

This is a proceeding for an injunction restraining defendants from continuing or maintaining, any policy, practice, custom, custom and usage of withholding, denying, attempting to deprive, otherwise interfering, with the rights of the plaintiffs and others similarly situated, of equal utilization of a public facility which is owned, operated, or managed by the City of Tallahassee, State of Florida, to wit: recreational facilities comprising three swimming pools; without discrimination or segregation on the grounds of race or color.

V

The plaintiffs are of the Negro race, residing in the City of Tallahassee, State of Florida, and are citizens of the United States. Plaintiff Sadie Estelle Gordon is of full age; plaintiffs Rochelle Steele and Darryl Steele, are infants under the age of twenty-one, who are suing by their next friend, Reverend C. K. Steele. All plaintiffs are of the class who are deprived and have been deprived of equal utilization of certain public facilities as herein more fully appears.

VI

Defendant George B. Taft is the Mayor of the City of Tallahassee and has general supervision of the Police Department, and defendant Frank Stoutamire, is Chief of Police, of the City of Tallahassee, and they are charged with the enforcement of the state laws of Florida and the City Ordinances of the City of Tallahassee. Defendants are sued in their official capacity.

VII

Defendant Arvah Hopkins is the City Manager of the City of Tallahassee and is the chief administrative officer of Tallahassee. He holds office at the pleasure of the City Commission and acts as administrative leader under the direction and supervision of the City Commission. He is in charge of the Recreation Department, Swimming Pools Department, and Parks Departments. It is the City Managers duty to keep the City Commission fully advised as to the financial condition and needs of the city and to submit for its consideration an annual budget. The said defendant is sued in his official capacity.

VIII

Defendants Hugh Williams, Joe Cordell, David Atkinson, and William H. Cates, are Commissioners of the

City of Tallahassee and are charged with the enforcement of the laws of the State of Florida and serve the legislative function of municipal government. Said defendants are sued in their official capacities.

IX

Defendant Recreation Board, is a public body created and existing under the laws of the State of Florida and Code of the City of Tallahassee, for the purpose of maintaining public recreational facilities in the City of Tallahassee. JAMES HARDAWAY, is RECREATION DIRECTOR; LESLIE ABERSTEIN, ROY BERRYM, DR. J. T. BIXLER, W. P. STILL, and BILLY OWENS, are members of the RECREATION BOARD. Said defendants are sued in their official capacity. The Recreation Director and members of the Recreation Board are shown on the face of the complaint and are sued in their official capacity.

X

Defendant Park Board of the City of Tallahassee, is a public board created, or regulated and controlled, and existing under the laws of the State of Florida and Code of the City of Tallahassee, for the purpose of providing and maintainign park facilities in the City of Tallahassee. The members of the Park Board are shown on the face of the complaint and are sued in their official capacity.

XI

Defendant Wade Wehunt, is Department Head of the Swimming Pools Department, and also is associated with the Civil Defense Department of the City of Tallahassee and an essential purpose of the Swimming Pools has been to participate each year in a nationally recognized Water Safety Program including swimming and life saving instructions. The defendant is sued in the official capacity he has with the City of Tallahassee.

XII

On information and belief, aforesaid swimming pools were constructed, supported and maintained by public funds, and are essential for the health, education, safety and welfare of the citizens of Tallahassee.

XIII

Heretofore the City of Tallahassee owned and operated, and presently owns and operates numerous recreational facilities, located within the City of Tallahassee, for the general use of the residents of the City of Tallahassee and that among the aforedescribed recreational facilities are three swimming pools, their being Myers Park, Levy Park, and Robinson Trueblood, the first of two of which were solely for the use of white persons; Negores not being permitted by the City of Tallahassee, the defendants, their agents, representatives and employees, to use same.

XIV

The City of Tallahassee and the aforesaid defendants, while acting under color of law in their official capacities have been and are enforcing a policy, practice and custom of discrimination against plaintiffs, because of race, in the utilization of swimming pools and have deprived the plaintiffs of privileges and immunities granted to every citizen including the plaintiffs, in violation of the Fourteenth Amendment of the United States Constitution and by reason of Section 1342 of Title 28 of the United States Code as herein more fully appears.

XV

That heretofore the City of Tallahassee in violation of the Fourteenth Amendment to the United States Constitution, and Section 1983 of Title 42 of the United States Code, deprived the Negro citizens of the City of Tallahassee of equal protection of the laws and discriminated illegally against them by denying them the right, as a class, and individually to use certain of the recreational facilities, more particularly the aforesaid swimming pools designated for white persons only, as herein more fully appears.

XVI

That on or about the Forth day of July, 1964, a group of Negroes attempted to utilize Levy Park Pool, one of the above swimming pools; immediately, that same afternoon, City Manager Arvah Hopkins ordered all three swimming pools closed, that said pools have been closed since their closing on the Fourth day of July, 1964, and that City Manager Arvah Hopkins has refused to open them on basis which would not deny equal utilization of the said swimming pools.

XVII

That said closing of the aforesaid swimming pools was solely for the purpose of depriving the plaintiffs and the class they represent as aforesaid, of equal rights and equal protection of the laws and privileges and immunities; that the object of the closing of the pools was not a constitutional one but was done purposely and deliberately on the grounds of race and opposition to desegregation; that the object and effect of the closing of the swimming pools is to deny equal utilization of the recreational facilities of the three swimming pools; that unless the defendants, their agents, representatives, or other persons acting in their behalf and name or on their behalf whether directly or indirectly are restrained and enjoined from continuing their acts of discrimination against plaintiffs and the class they represent as described aforesaid, in closing the said swimming pools, and unless defendants are directed and ordered to reopen said pools to be used by persons entitled thereto regardless of race, color, and without discrimination plaintiffs and the class they represent, shall be deprived illegally of equal protection of the laws and privileges and immunities, as guaranteed by the Constitution of the United States and the statutes thereunder.

XVIII

The plaintiffs and those similarly situated have suffered damages by reason of action of said defendants and will have suffered irreparable damages unless defendants are enjoined from continuing such damages; and the plaintiffs have undergone and will continue to undergo unnecessary expense and legal fees of the amount approximating the sum of ten thousand ($10,000.00) because of the illegal acts of the defendants as described above.

XIX

The plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgement; 1. Declaring the practice, policy and acts of the City of Tallahassee and their defendants as above recited to be unconstitutional. 2. That the defendants, their agents, representatives, employees and all people acting in their behalf, either directly or indirectly, be ordered and directed to reopen the said pools on a non-discriminatory basis without regard to race, color, or creed. 3. Pending of the above swimming pools; immediately, that same afternoon, City Manager Arvah Hopkins ordered all three swimming pools closed, that said pools have been closed since their closing on the Fourth day of July, 1964, and that City Manager Arvah Hopkins has refused to open them on basis which would not deny equal utilization of the said swimming pools.

XVII

That said closing of the aforesaid swimming pools was solely for the purpose of depriving the plaintiffs and the class they represent as aforesaid, of equal rights and equal protection of the laws and privileges and immunities; that the object of the closing of the pools was not a constitutional one but was done purposely and deliberately on the grounds of race and opposition to desegregation; that the object and effect of the closing of the swimming pools is to deny equal utilization of the recreational facilities of the three swimming pools; that unless the defendants, their agents, representatives, or other persons acting in their behalf and name or on their behalf whether directly or indirectly are restrained and enjoined from continuing their acts of discrimination against plaintiffs and the class they represent as described aforesaid, in closing the said swimming pools, and unless defendants are directed and ordered to reopen said pools to be used by persons entitled thereto regardless of race, color, and without discrimination plaintiffs and the class they represent, shall be deprived illegally of equal protection of the laws and privileges and immunities, as guaranteed by the Constitution of the United States and the statutes thereunder.

XVIII

The plaintiffs and those similarly situated have suffered damages by reason of action of said defendants and will have suffered irreparable damages unless defendants are enjoined from continuing such damages; and the plaintiffs have undergone and will continue to undergo unnecessary expense and legal fees of the amount approximating the sum of ten thousand ($10,000.00) because of the illegal acts of the defendants as described above.

XIX

The plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgement; 1. Declaring the practice, policy and acts of the City of Tallahassee and their defendants as above recited to be unconstitutional. 2. That the defendants, their agents, representatives, employees and all people acting in their behalf, either directly or indirectly, be ordered and directed to reopen the said pools on a non-discriminatory basis without regard to race, color, or creed. 3. Pending the trial of this action, temporarily enjoining the City of Tallahassee and said defendants from: (a) selling or offering to sell the swimming pools of the City of Tallahassee, unless on a condition that they shall be utilized on a non-discriminatory basis; (b) permitting or granting the right to any party, person, or group of persons to utilize the swimming pools of the City of Tallahassee unless on a condition that they shall be utilized on a non-discriminatory basis. 4. Awarding plaintiffs judgement for the sum of fifty thousand dollars ($50,000.00) damages, compensatory and punitive, as well as this litigation, including reasonable attorneys fees, plus the cost of this action. 5. Awarding plaintiffs such other and further relief as may be just.

Respectfully submitted

s/ John D. Due, Jr.
John D. Due, Jr.
540½ West Brevard Street
Tallahassee, Florida

Bruce Rogow
540½ West Brevard Street
Tallahassee, Florida

Carl Rachlin
38 Park Row
New York 38, New York

ATTORNEYS AT LAW

- - - - -

VERIFICATION

FLORIDA, LEON COUNTY:

PERSONALLY APPEARED before me the undersigned authority, and after being duly sworn deposes and says that he is the plaintiff in the above and foregoing complaint and that the facts alleged therein are true.

s/ Rev. C. K. Steele, Sr.

Subscribed and sworn before me, this 20 day of May, 1965.

s/ Emett C. Greene
Notary Public, State of Florida at Large
My Commission Expires July 29, 1968 (Seal)

Notary Public

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VERIFICATION

FLORIDA, LEON COUNTY:

PERSONALLY APPEARED before me the undersigned authority, and after being duly sworn deposes and says that he is the plaintiff in the above and foregoing complaint and that the facts alleged therein are true.

s/ Sadie E. Gordon

Subscribed and sworn before me, this 20 day of May, 1965.

s/ Emett C. Greene
Notary Public State of Florida at Large
My Commission Expires July 29, 1968

Notary Public (Seal)

...oOo...

MOTION TO DISMISS BY DEFENDANT GEORGE B. TAFF, MAYOR

(Number and title omitted) (Filed: June 14, 1965)

Comes now the Defendant, GEORGE B. TAFF, Mayor of the City of Tallahassee, State of Florida, by and through the undersigned attorneys and moves this honorable court to dismiss the Complaint heretofore filed herein on the following grounds.

1. Insufficiency of process as to this Defendant.

2. Insufficiency of service of process as to this Defendant.

3. Failure of the Complaint to state a cause of action against this Defendant upon which the relief sought may be granted.

s/ Roy T. Rhodes
Roy T. Rhodes
102½ South Monroe Street
Tallahassee, Florida

s/ Rivers Buford, Jr.
Rivers Buford, Jr.
404 Midyette Moor Building
Tallahassee, Florida

Attorneys for the above Defendant

...oOo...

MOTION TO DISMISS BY DEFENDANT HUGH WILLIAMS

(Number and title omitted) (Filed: June 14, 1965)

Comes now the Defendant, Hugh Williams, Commissioner of the City of Tallahassee by and through the undersigned attorneys and respectfully moves this honorable court to dismiss this cause on the ground that the Complaint heretofore filed herein fails to state a cause of action upon which the releif sought by the Plaintiffs herein can be granted.

s/ Roy T. Rhodes
Roy T. Rhodes
102½ South Monroe Street
Tallahassee, Florida

s/ Rivers Buford, Jr.
Rivers Buford, Jr.
404 Midyette Moor Building
Tallahassee, Florida

Attorneys for the above Defendant

...oOo...

MEMORANDUM RE INDIVUDUAL MOTIONS TO DISMISS FILED BY FIFTEEN DEFENDANTS

The motions to dismiss filed by defendants James Hardaway and Max Humphrey are identical to defendant George B. Taft's Motion to Dismiss.

The motions to dismiss filed by the remainder of the defendants included in the docket entry for 6/14/65 are identical to that filed by defendant Hugh Williams.

In the interest of brevity, only the motions to dismiss filed by defendants Taft and Williams are included in the Record on Appeal.

Wm. Logan Hill, Clerk
U. S. District Court
Northern District of Florida

By: s/ Chas. H. Keller
Chas. H. Keller, Deputy

(Seal)

...oOo...

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUCTION

(Number and title omitted) (Filed: July 14, 1965)

Plaintiffs move the court to issue a temporary restraining order and/or preliminary injunction restraining and enjoining defendants, their agents, successors, employees and all those acting in their behalf:

1. That defendants, their agents, employees and all persons acting in their behalf, directly and indirectly, be ordered and directed to re-open the said swimming pools on a non-discriminatory basis without regard to race, color or creed.

2. That defendants be temporarily enjoined from selling, assigning, transferring or otherwise disposing of said swimming pools of the City of Tallahassee.

3. That defendants be enjoined from permitting or granting any party, person or persons, or organization the right to use said swimming pools in any manner whatsoever which shall result in discrimination against any person because of race or color.

4. Such other and additional relief as the Court shall deem proper.

s/ John D. Due, Jr.
John D. Due, Jr.
540½ West Brevard Street
Tallahassee, Florida
Attorney for Plaintiffs

...oOo...

ORDER OF DISMISSAL

(Number and title omitted) (Filed: July 19, 1965)

On May 21, 1965, complaint was filed by plaintiffs alleging, basically, Constitutional violations by the named individual defendants, all of whom have some official capacity with the City of Tallahassee, and seeking affirmative relief in the form of an order from this Court directed to the City of Tallahassee, through its said officers, to open and operate three swimming pools owned by the City and closed since July, 1964.

Counsel of record for plaintiff, Mr. John Due, presented to the Court associate counsel, Mr. Jack Brian, as a member of the Bar of the State of Pennsylvania and who has been previously admitted to practice before the United States District Courts and Court of Appeals of the Third Circuit and to the Supreme Court of the United States. In accordance with usual practice, upon motion of counsel duly admitted to practice before this Court, associate counsel was recognized and presented arguments in behalf of the plaintiffs. Mr. Roy Rhodes, Attorney for the City of Tallahassee, appeared to present arguments in behalf of defendants. Counsel for both parties have waived any objection to timeliness of notice for this hearing, and counsel for the City of Tallahassee reserved right to argue pending motions with respect to sufficiency of service and service of process and pending determination of the defendants' respective motions to dismiss the complaint for failure to state a cause of action. It was to the motion to dismiss for failure to state a cause of action that counsel addressed themselves, and which is now before the Court.

With admirable candor counsel for the plaintiffs concedes that a number of cases virtually identical in point here have been resolved in favor of the defendant city. See Hampton v. City of Jacksonville, Florida, 304 F.2d 319 (5th Cir.); City of Montgomery, Alabama, v. Gilmore, 277 F. 2d 364 (5th Cir.); Tonkins v. City of Greensboro, North Carolina, 162 F. Supp. 549; and Clark v. Flory, 237 F.2d 597 (4th Cir.).

Plaintiffs contend, however, that these cases are now overruled by the opinion of the Supreme Court of the United States in Griffin v. County School Board of Prince Edward County, Virginia, 377 U.S. 218 (1964). A careful reading of the Prince Edward County case convinces this Court that there is nothing contained therein which gives substance to plaintiffs' argument here. The distinctions between that case and this are numerous and apparent. This Court can find nothing in the language of the opinion which would indicate that municipalities can be compelled by Court order to open and operate swimming pools, the basic reasons for which have been fully and adequately set forth in the first four cases cited above. It is noted especially that there could be no discrimination prohibited by the Constitution in the total failure to maintain the facilities such as all of the swimming pools under the control of the City. The failure to render such discretionary service by the City may well be subject to valid criticism as a matter of public policy. On the face of it such policy may seem tragically absurd, but such decision is clearly under the law a function and responsibility of the elected public officials and the officers and employees working under them. The City concedes, as it must, that these facilities cannot be leased, or otherwise allowed to be operated by others to effectuate a racially discriminatory policy. The undisputed fact here, as shown by the complaint itself, is that the pools are not being operated at all.

In consideration of the foregoing and upon the line of established authorities cited by counsel for both plaintiffs and defendants, it is, therefore, hereby

ORDERED that the motions of the respective defendants to dismiss the complaint against them, individually and collectively, for failure to state a cause of action be and they are hereby granted.

DONE and ORDERED in Chambers at Tallahassee, Florida, this 16th day of July, 1965.

s/ G. Harrold Carswell
G. HARROLD CARSWELL
United States District Judge

...oOo...

NOTICE OF APPEAL

(Number and title omitted) (Filed: July 23, 1965)

Notice of Appeal is hereby given by Plaintiffs individually and as representatives of their class to the Fifth Circuit Court of Appeals from the order of Judge G. Harrold Carswell dismissing the action herein above captioned and denying Plaintiffs' motion for a preliminary injunction.

s/ John D. Due, Jr.
Attorney for Plaintiffs
540½ West Brevard
Tallahassee, Florida

s/ Carl Rachlin
Attorney for Plaintiffs
540½ West Brevard
Tallahassee, Florida

s/ Jack Brian
Attorney for Plaintiffs
38 Park Road
New York 38, New York

s/ Bruce Rogow
Attorney for Plaintiffs
540½ West Brevard
Tallahassee, Florida

...oOo...

DESIGNATION

(Number and title omitted) (Filed: August 2, 1965)

Dear Madam,

Please take notice that plaintiffs, in the above entitled case, Civil Action # 1073, are appealing the judgment against them on the motion to dismiss which was heard before Judge Carswell on July 16, 1965.

As attorneys for the plaintiffs, we hereby designate the entire record to be sent to Mr. Wadsworth, the clerk of the Fifth Circuit Court of Appeals. Please certify and send the record to the Court of Appeals as soon as possible.

Yours truly,

s/ John D. Due, Jr.
John D. Due, Jr.

Mrs. Myra Sims

cc: Edward W. Wadsworth
Roy T. Rhodes

...oOo...

AMENDED DESIGNATION OF RECORD

(Number and title omitted) (Filed: August 2, 1965)

The plaintiffs hereby amend and clarify their designation in the above entitled action. They hereby designate to be included in the record upon the appeal of this cause, all:

pleadings,

motions,

briefs,

orders, and

papers pertaining to the appeal of this cause filed or entered in this action.

s/ John D. Due, Jr.
John D. Due, Jr.
540½ West Brevard Street
Tallahassee, Florida
Attorney for Plaintiffs

...oOo...

DEFENDANTS-APPELLEES DESIGNATION OF RECORD

(Number and title omitted) (Filed: August 12, 1965)

The Defendants-Appellees, by their undersigned attorneys, hereby designate the following portions of the records, proceedings and evidence to be contained on the record on appeal taken by the Plaintiffs-Appellants in this cause in addition to those heretofore designated by the Plaintiffs in their Designations of Record.

1. The entire proceedings before the Court on the hearing held July 16, 1965.
2. Plaintiffs' Notice of Appeal.
3. Plaintiffs' Designation of Record.
4. Plaintiffs' Amended Designation of Record.
5. This Designation of Record.

s/ Roy T. Rhodes
ROY T. RHODES
102½ South Monroe Street
Tallahassee, Florida

City Attorney

...oOo...

ORDER FOR EXTENDING TIME FOR FILING RECORD ON APPEAL

(Number and title omitted) (Filed: September 1, 1965)

It appearing to the Court that the record on appeal cannot be filed and docketed in the United States Court of Appeals within the time allowed by law, it is, therefore, hereby

ORDERED that the time for filing the record on appeal in the United States Court of Appeals be extended to and including the 21st day of October 1965.

DONE AND ORDERED in Chambers at Tallahassee this 1st day of September 1965.

s/ G. Harrold Carswell
G. HARROLD CARSWELL
United States District Judge

...oOo...

UNITED STATES OF AMERICA
ss
NORTHERN DISTRICT OF FLORIDA

I, Wm. Logan Hill, Clerk, U. S. District Court in and for the Northern District of Florida, do hereby certify that the annexed and foregoing documents herein listed below constitute the original court file in the case of:

ROCHELLE STEELE, et al.,
Plaintiffs,

v.

GEORGE B. TAFT, et al.,
Defendants,

being Tallahassee Civil Action No. 1073 filed in the United States District Court for the Northern District of Florida.

DOCUMENT NUMBER	DESCRIPTION	PAGE NUMBER
1.	Copy of U. S. District Court Docket	1
2.	Complaint filed 5/21/65	3
3.	Motion to Dismiss filed 6/14/65 (Deft. Taff)...	13
4.	Motion to Dismiss filed 6/14/65 (Deft.Williams)	15
5.	Memorandum of Clerk, U. S. Dist. Court, re Individual Motions to Dismiss filed by other defendants on 6/14/65	17
6.	Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction filed 7/14/65	18
7.	Order of Dismissal entered by U. S. District Court on 7/19/65	19
8.	Plaintiffs' Notice of Appeal filed 7/23/65....	23

9. Appellants' Designation filed 8/2/65 24

10. Plaintiffs' Amended Designation of Record filed 8/2/63 25

11. Appellees' Designation of Record filed 8/12/65 27

12. Order for Extending Time for Filing Record on Appeal entered by U. S. District Court on 9/1/65 28

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Pensacola, Florida, this 20th day of October, 1965.

Wm. Logan Hill, Clerk

By: s/ Chas. H. Keller
Chas. H. Keller, Deputy

(Seal)

...oOo...

TRANSCRIPT OF PROCEEDINGS

(Number and title omitted) (Filed: December 16, 1965)

Tallahassee, Florida

July 16, 1965

BEFORE:

HONORABLE G. HARROLD CARSWELL,

UNITED STATES DISTRICT JUDGE

(2)
APPEARANCES CONTINUED:

HONORABLE JACK BRIAN
540½ West Brevard Street
Tallahassee, Florida

Attorney for Plaintiffs

HONORABLE ROY T. RHODES
102½ South Monroe Street
Tallahassee, Florida

HONORABLE RIVERS BUFORD, JR.,
404 Midyette Moor Building
Tallahassee, Florida,

Attorneys for the defendants

(3) **THE COURT:**

Good morning. Be seated, please.

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

THE COURT:

This is a hearing on really two matters, actually, or more, with respect to the case of Steele vs. Taft, so-forth, on one hand a Motion to Dismiss filed in behalf of the defendants and on the other a Motion for Temporary Restraining Order and Preliminary Injunction filed on behalf of the plaintiffs. The Motion to Dismiss has been pending for awhile longer, matter of fact some thirty days longer, and by the, as I understand it, agreement of everyone concerned these matters can be brought up at this time without any further ado.

MR. RHODES:

May it please the Court, we would like the record to show the complaint in this cause was filed May 21st, 1965. Subsequently most of the defendants (4) named were served during the month of May and within the prescribed legal time Motion addressed to that complaint seeking its dismissal for failure to state a cause of action in several instances and other instances dealing with insufficiency of process or service of process was filed. That subsequent to that in point of time on Thursday, July 15th, yesterday, this week, I received a letter from John D. Due, Jr., attorney of record for the plaintiffs in this cause in which I was apprised "I am enclosing Motion for Temporary Restraining Order and Preliminary Injunction in this case, which was filed with Judge Carswell on Wednesday, July 14th. He has scheduled argument on the motions for Friday, July 16th, 1965 at 11:00 AM". In order to direct my reflect the expeditious nature by which the instant filed motion for Temporary Restraining Order and Temporary Injunction is now being scheduled by the Court today, Friday.

THE COURT:

All right, sir. Let the record so show. (5) The basic thing here to start with is, I believe, to take up the matter of the Motions to Dismiss. They have a prior standing in the point of filing and they, also, as in all cases, it is customary for those things to be gone into. I will be glad to hear you on that.

MR. RHODES:

May it please the Court, in that neither of the three attorneys whose names appear on the complaint are the attorneys' names who appear on this motion filed in that appear to be in Court and for purposes of the record I wonder if the gentlemen present for the opposing side would identify himself so we may know.

THE COURT:

All right, sir.

MR. BRIAN:

Unfortunately I have never had the privilege of appearing before Your Honor before, I am Jack Brian. I have given my name to the Clerk. I am a member of the Bar from the State of (6) Pennsylvania, admitted to practice before the Supreme Court of Pennsylvania and he District Courts, Federal District Courts in the Eastern District of Pennsylvania; the Federal Circuit ourt of Appeals, Third Circuit, and the United States upreme Court.

I am happy that Your Honor has extended to me the courtesy to argue this matter on behalf of the plaintiffs as Your Honor knows it is unfortunate for Mr. Due to do as he is unable to be present today, as Your Honor knows.

THE COURT:

Well, I can only say --

MR. BRIAN:

Your Honor,

THE COURT:

-- I want to say something in response to that, Mr. Brian. The inquiry was made of the Court -- I want the record to be clear about this -- by Mr. Due as to the attitude of the Court with (7) respect to your arguing a motion here today. I advised Mr. Due, as is the course in any case, that as an associate counsel for the purpose of an appearance with respect to one case, upon the suggestion of counsel duly admitted to practice before this Court, that that would be done. I must say, however, that I am surprised that he is not here and it was nothing ever intended by the Court to waive the rules of the Court in this regard. I mean this is perfectly standard normal procedure, there is nothing unusual about it, counsel from other states or from anywhere have come into this court and done so for longer than I can remember I am sure upon the motion of associate counsel. However, it has always been inherent within the field of things that associate counsel would be present and the rules are very explicit about the matter. I don't think there is any confusion about it. I must say that I am very much surprised that he isn't here and he certainly should have been. There is nothing inherent in anything whatsoever in any discussion to waive that. (8) I do receive you here in accordance with that rule but he certainly should be here. Why isn't he here?

MR. BRIAN:

Sir, I am not familiar with why, I assume he is tied up on other matters.

THE COURT:

This hearing was scheduled as you know, you and Mr. Due came to see me.

MR. BRIAN:

Yes sir.

THE COURT:

And asked for a hearing. I said I could give you one that afternoon within a matter of hours. This was not agreeable with opposing counsel. I told you I could hear you at any time from that moment until this afternoon if you and Mr. Rhodes were in agreement. The Court was available. I suggested Thursday if it would be more appropriate than today, you will recall I am sure.

MR. BRIAN:

Yes sir.

(9)
THE COURT:

And at your specific request you asked for it on Friday, it was more desirable, because Mr. Due told me he had to be in Marianna on Thursday. So the matter was set at this hour at your specific request. I don't see any reason to make any further ado about it but I do think the rules of the court are going to have to be observed in some more particular, we just can't waive every rule that comes along on these matters. I note the objection but we are going to proceed to go ahead.

MR. RHODES:

May it please the Court, at this point to what am I to address myself on?

THE COURT:

The Motion to Dismiss. You have a motion to dismiss. I am merely calling them in chronological order and that is the first one on top of the file.

MR. RHODES:

(10) Initially, then I would like to address myself to the Motion of the defendant, George B. Taft, Mayor of the City of Tallahassee, to dismiss this complaint as to him, as a defendant, for individual process of that defendant, for insufficiency of process as to that defendant and the failure of the complaint to state a cause of action for the relief to be granted.

Addressing myself to the first two points in the style of the cause and in the summons which was attached to the cause which was served upon the person who occupies the position of Mayor of the City of Tallahassee, as identified, the man George B. Taft.

THE COURT:

Mr. Rhodes, may I make a suggestion?

MR. RHODES:

Yes sir.

THE COURT:

Without your waiving any claims along those lines on those motions, would it not be better to move (11) into the failure to state a cause of action, as such, because if I understand your motion correctly, if you are right about that part of it, the other is moot, isn't it?

MR. RHODES:

Yes sir.

THE COURT:

Without your waiving any of those rights at all, I merely ask you to take that matter up first.

MR. RHODES:

Addressing myself to the primary failure to state a cause of action against the defendant, George F. Taft, shall I address myself, Your Honor, to the Motion of the defendant electing to file a motion stating that?

THE COURT:

If I read your Motions correctly they all state the same basic thing.

MR. RHODES:

Yes sir. The complaint, if it please the Court, concerns itself with an effort on behalf (12) of a class to enjoin the collective defendants --and I will read you paragraph IV --

"This is a proceeding for an injunction restraining defendants from continuing or maintaining, any policy, practice, custom, custom and usage of withholding, denying, attempting to deprive, otherwise interfering, with the rights of the plaintiffs and others similarly situated, of equal utilization of a public facility which is owned, operated, or managed by the City of Tallahassee, State of Florida, to-wit: recreational facilities comprising three swimming pools; without discrimination or segregation on the grounds of race or color."

Then the complaint goes on to state that the swimming pools involved are three pools located in the City of Tallahassee; and that these pools were closed in July of 1964. This is more than a year ago. And goes on to say that because these pools remain closed, I assume, that these plaintiffs are denied of equal protection of the law and being discriminated against, in violation of the Fourteenth Amendment, (13) Section 1342 of Title 28, and

Title 18, -- Section 1983 of Title 42. Our position, purely and simply, Your Honor, is that we acknowledge and recognize what the law says. We, in the City of Tallahassee, are not operating municipal pools on a segregated basis. We have no municipal pools that are in operation. I think the base of this complaint reflects that there are no municipal pools in operation in any manner, segregated or otherwise. Therefore, factually and as a matter of law, there can be no basis for the relief sought in this complaint, to affirmatively require the City of Tallahassee to open a facility which in its discretion has been closed. To require that they be restrained from selling the facilities which under the law of this land we are at liberty to sell; and to enjoin a leasing or a use that would result in discrimination, when we recognize that the law of the land would prohibit such a use.

HE COURT:

Do I understand you correctly on your last statement hat the City at this hearing, through (14) you, as its ttorney, represents to this Court that they are fully in ccord there could not be any kind of lease arrangement which ould result in actual segregation, discrimination, under he Fourteenth Amendment which could be legal? Is that what ou just said?

R. RHODES:

We recognize under the Fourteenth Amendment a municipality may not operate a pool under its governmental authority at this time.

THE COURT:

Either in its own capacity or through a lessee?

MR. RHODES:

It may be possible, Your Honor, on the parallel cases in this Appellate Circuit originating in New Orleans and Montgomery, I believe, where the proposition was recognized that while as a general rule a municipality would be, or a governmental agency, would be prohibited from a long term lease of a facility to a private enterprise which was operated (15) on a segregated basis. While that is true, the Fifth Circuit Court of Appeals recognizes that specific short term leases of a facility that it was involved with at that time, which was an auditorium, could be leased, the language of the case, "for a short term", maybe overnight, maybe a day or two thing, to specific organizations whose membership --

THE COURT:

Was in fact one race or the other?

MR. RHODES:

Correct. Your Honor, I think our Fifth Circuit in those cases recognizes in specific isolated instances this could be done and it would not be a violation of the Fourteenth Amendment and certainly I see the wisdom by the

Fifth Circuit, otherwise we acknowledge the principle we cannot operate it, the City of Tallahassee segregated municipal swimming pools.

THE COURT:

Mr. Rhodes, did you make any effort to resear[illegible] the la as to whether or not there is any (16) case in the country, in any Circuit, which has held that a municipality can be compelled to operate swimming pools?

MR. RHODES:

Quite the contrary, Your Honor, I have searched the law and came to the conclusion that the Courts have repeatedly held that a governmental agency, such as a unicipality, cannot be required to operate a discretionary acility. There are many cases I can specifically call to he Court's attention if you desire that involve specific reas of recreation which municipalities have elected to lose, in fact closed, and removed from public use in its unicipal discretion, and the Court recognizes the right of he municipalities and have said that this did not involve violation of any right of the Fourteenth Amendment of nybody, and that they would not be required or compelled o open them or to provide a discretionary recreational acility. For instance, may it please the Court, in this ituation now before the Court, here in July, of 1965, the ity of (17) Tallahassee is operating within its fiscal budget, commencing February 1st, March 1st of this year and goes through February 1, 1966, the City Commission of the City has appropriated no funds for the operation and maintenance of a municipal swimming pool in the City of Tallahassee. There were no funds provided in the budget under which the City of Tallahassee is operating at this time. The pools have not been opened during this fiscal year and they are closed now, and there are no funds in the appropriation of the budget for the fiscal year providing for their opening and their operation. The entire proposition before the Court, on its face, is a moot one, and we think should be dismissed. There is no showing of the existence at the present time in the allegations of this complaint of the deprivation of anyone of their Constitutional Rights to which they are entitled. To do otherwise would involve, I feel, judicial direction, or exercise by municipalities that would involve if any changes are sought that would involve a direction of appropriation, then the source from which that appropriation (18) comes, merely which the appropriation would be budgeted and be extended. It might well, under the same theory, go far beyond the purview and the scope of the operation of swimming pools under a judicial find, and have a municipality directed to go ahead and then not do anything that would be in violation of the Constitution or illegal. For instance, it may be directed under the same procedure not to perform any illegal searches and seizures. I think the Court can see where this would lead us. Without question, I think, that a governmental entity will recognize and respect and obey the law of the land. The City of Tallahassee will.

THE COURT:

Thank you. Mr. Brian I don't want to take your argument away from you and I will not, but I do want to ask you one question at the outset, however. Can you tell me at the outset here upon what authority that this Court could require a municipality to operate swimming pools?

MR. BRIAN:

Sir, the short answer to that is the (19) case of Griffin vs. Board of Education of Prince Edward County, --

THE COURT:

Is that the Virginia school case?

MR. BRIAN:

--decided by the United States Supreme Court, opinioned by Justice Black, speaking for the entire Court without dissent, several years ago.

I would like, if Your Honor please, to develop the full range of my argument and I will get to that case and discuss it extensively, if the Court will let me.

THE COURT:

Well, I want to ask you one other question. Are you familiar with the case of the City of Jacksonville, decided by Judge Simpson some years ago?

MR. BRIAN:

Is that the case of Hampton vs. City of Jacksonville?

THE COURT:

I am not sure what the style of the case is, but it involves that identical matter.

(20) MR. BRIAN:

I am familiar with that case and I am familiar with others that have reached the same result, particularly the case of Tonkins vs. The City of Greensborough, a recent case, which I think even more strongly supports the position I take. I would like to discuss these cases as well in the context of my argument, because I think, whether Your Honor has had a chance to examine these cases, there is error, and which you will conclude that they, it is quite clear distinguished and remote from our situation and many of the facts are governed by a more recent case, Griffin vs. Board of Education.

THE COURT:

All right, sir. You may proceed.

MR. BRIAN:

I would like to say in prefacing my remarks here we are in the process of writing our brief. As a matter of fact, we had hoped to have it typed and present it to Your Honor prior to the time of argument. I would like leave of the Court to file (21) it later.

THE COURT:

You may do so. What time?

MR. BRIAN:

I believe we will have it ready to be filed by 2:00 o'clock this afternoon.

THE COURT:

All right.

MR. BRIAN:

I think it will be well to begin my argument by referring briefly to the sequence of events under which this case arose. Our complaint setsforth, briefly, that following the enactment of the Civil Rights Act of 1964, signed by the President of the United States on July 2nd, 1964, that two days thereafter, on July 4th, 1964, that several negro youngsters appeared at the Levy Park swimming pool in the City of Tallahassee and attempted to gain admission and use the facilities of the pool. That same afternoon that pool and the other two pools operated by the (22) City of Tallahassee were summarily closed by order of the City Manager of the City of Tallahassee. And these pools have remained closed since that date.

There has been to my knowledge no action by the Board of Commissioners or other City Body of the City of Tallahassee. There has been no discussion, no action of any board whatsoever taken either confirming and verifying or legalising the action the City Manager and his action taken on his own initiative is the situation that we confront today and out of which this suit arose.

We are discussing initially here, if the Court please, a Motion to Dismiss, and I am certain I need not labor the point for Your Honor for such a motion holding material allegations of fact in our complaint must for the purpose of this argument be taken as true. Now, this is significant in the light of Paragraph VII of our complaint. I don't intend to read it. The complaint is before Your Honor. In essence Paragraph VII alleges that the City Manager and other unnamed defendants, officials, (23) has a duty to report to others which amounted to a deliberate and intentional closing of those pools in violation and with the specific purpose and intent of denying to the plaintiffs and those similarly situated their rights under the Fourteenth Amendment of the United States Constitution and deliberately and wilfully and intentionally did so.

THE COURT:

Is it your argument that there is a Constitutional right inherent to each citizen to swim in a pool?

MR. BRIAN:

Absolutely not.

THE COURT:

Then what is your argument?

MR. BRIAN:

I would like to develop it if I may.

THE COURT:

You may.

MR. BRIAN:

I refer to Paragraph VII of the complaint. It is significant, in my opinion, that (24) the motive for the closing of the pools is of legal consequence.

MR. RHODES:

May it please the Court, I don't want to interrupt, but Paragraph VII, if he is referring to Paragraph VII is not closing of the pools.

MR. BRIAN:

I may have the wrong number. It is Paragraph XVII--thank you very much Mr. Rhodes. I said, Your Honor, that the motive of defendants is significant and this motive as setforth in Paragraph XVII of our complaint must be taken to be true. Now, why is the motive of the defendants significant? There are a line of cases which I may refer to -- Lawrence vs. Hancock, which was a case involving a swimming pool; Tate vs. Department of Conservation and Development, involving a State Department; Simpkins vs. City of Greensbborough, involving a golf course; the different facilities involved principles of law enunciated by identity. And in these cases a common threat in which the

Court has specifically stated that a municipality may not enter into some action, transaction, where the deliberate intentional purpose of that action is to deny the agreed party their right under the Fourteenth Amendment, which in effect would result in discriminatory treatment. So, I say to your Honor, that the motive is important and needs taken without exception on the part of a municipality which requires action and in these cases lease transferring the facility to private organizations had to be stricken.

THE COURT:

I think opposing counsel agrees with you on that basis as a principle of law.

MR. BRIAN:

Now, as a matter of fact, I would like at this point to refer to the last case which is even stronger. These line of cases in which motive is not actually discussed at any length, appears a fact to be irrelevant. These cases I also cited in my brief -- they are the City of Montgomery, and the case to which the Court referred earlier, Hampton v. City of Jacksonville; and in these cases it is quite (26)
true, Mr. Rhodes in his argument, Your Honor, that the Court stated quite clearly that no one had a right, a Constitutional right to have a swimming pool, a discriminatory swimming pool, and that if the City in its wisdom was determined to follow this that no discriminatory

treatment could be followed because the closing of the facility acted fully upon both parties; and, therefore, there was no discrimination. As a matter of fact, the longest case, and I freely concede so, is Tonkins vs. The City of Greensborough. I would like to quote from that case.

THE COURT:

Let me ask you this, Mr. Brian --

MR. BRIAN:

Yes sir.

THE COURT:

-- have any of these cases reached the Fifth Circuit?

(27) MR. BRIAN:

Yes sir. Hampton vs. City of Jacksonville, I believe, has reached the Fifth Circuit.

THE COURT:

I believe Judge Simpson rendered a decision at the District Court level and he was affirmed by the Fifth Circuit, is that correct?

MR. BRIAN:

I think that was the Simkins case.

THE COURT:

Well, Judge Simpson is in Jacksonville.

MR. BRIAN:

The Court in Tonkins, has to say:

"If the swimming pools are closed at all (I am

quoting from page 556 to 162 Fed. Supp) --
If the swimming pools are closed at all or disposed of at a bona fide public sale, there can be no illegal treatment, and, therefore, no racial discrinination. No citizen of Greensborough will have access to municipal swimming pools:" --

(28) THE COURT:
Greensborough, what state?

MR. BRIAN:
Tonkins vs. the City of Greensborough, Greensborough, North Carolina. A North Carolina case.

THE COURT:
That would be the Fourth Circuit, another Circuit case.

MR. BRIAN:
-- unless persons under the same circumstances and conditions are treated differently, there can be no discrimination. No person has any Constitutional right to swim in public pools, citizens to have the right, however, if a public swimming pool is provided not to be barred therefrom because of race or color. If the swimming pools are closed or sold the right to all if closed or sold would not discriminate against anyone."

I take it that this in essence is what Mr. Rhodes is arguing what his position is.

(29) THE COURT:

Let me ask you this -- are you reading from the Fourth Circuit's opinion or a District Court opinion?

MR. BRIAN:

In this case, Your Honor, a District Court.

THE COURT:

Who is the Judge?

MR. BRIAN:

Opinion by Stanley, District Judge. I don't believe this case has been appealed.

THE COURT:

What is the date on that, Mr. Brian?

MR. BRIAN:

The date on this case is May 23, 1958.

THE COURT:

While you have got that, sir, give me the citation?

MR. BRIAN:

Tonkins, TONKINS vs. The City of Greensborough, 162 Fed. Supplement, page 549. the (30) quotation can be found at 556 and 557.

THE COURT:

Thank you. Do you have handy the other two cases that you mentioned?

MR. BRIAN:

I don't have the cases but at 2:00 o'clock you will have the complete citations.

THE COURT:

I thought you had them in your papers.

MR. BRIAN:

No sir, I do not. I think that I have stated the position against them. The strongest term that I know how. And I think that Your Honor will get the point that these cases we have discussed, to which I have referred, are no longer the law of the land. I say that, Griffin vs. Board of Education of Prince Edward County, decided by the United States Supreme Court and, in my opinion, which I submit to Your Honor, has overruled these other cases in the various Circuits and Districts, and which today represent the law of the land by all the Courts in the United States.

I would like to disucss at some length (31) should in view of the circumstances here.. In this case which arose in the State of Virginia in the County of Prince Edward after the decision in the land-mark decision in 1954 in Brown vs. Board of Education there was as had been determined in the opinion by Justice Black a massive resistance on the part of the State and various firms to deny the effect and consequence of the board of school litigation there. There were areas of litigation arising out of various bills enacted by the Virginia Legislature which purported to question the validity of the act, the right of the Brown case. All of them ultimately were returned. Ultimately the State of Virginia adopted a so-called free place system with respect to the public schools. In essence, what it amounted to was that instead of requiring compulsory attendance, relieving all counties of the duty of providing public instruction to the children of the State of Virginia, and incidentally footnote to that, the Court referred to the opinion by the Supreme Court of Virginia specifically held (32) the Constitution of Virginia no longer required, did not require I should say, compulsory school attendance. Did not require any taxation for the provision of taxes for public money for the payment of expenses incurred by the Department of Education.

The so-called free place system in essence was that each county was permitted to run its own school system and if the school children preferred to go to a private school the county would pay a tuition, or grant, for that child in order to pay a portion for its education. Prince Edward County at a later time determined to supplement that grant by a county grant. There are a series of litigation which I think are not particularly helpful here in which Mr. Patton assisted in many aspects. Ultimately, a suit goes into the question of the Constitutionality of this system in Prince Edward County and reached the Supreme Court under the heading of the Griffin case and the decision of the Supreme Court in that case was that, it says first -- "that the closing of the public facilities (33) (in this instance, the public schools), was discriminatory and a violation of the plaintiffs' rights under the Fourteenth Amendment of the United States Constitution. In violation of the equal protection laws. And that, as such, the Court would order through the District Court the reopening of those schools. And not only reorder the reopening of the schools, because the closing was in violation of rights of plaintiffs, but would order the public facilities in this county taxed to provide money for the expenses incurred in running and the operation of the schools."

THE COURT:

Is the thrust of your argument here then that the requirements of public education, which in effect broadly stands the Court, is to be correlated with the operation of swimming pools?

MR. BRIAN:

I respectully submit, Your Honor, it is.

THE COURT:

The undertaking of any municipality, anywhere, (34) if itself undertake it, then there is a Constitutional right invested in the citizens then to keep it going?

MR. BRIAN:

Certainly I would phrase it, I would say that the obligation is upon the municipality to run it equal for all citizens so that there is no unequal treatment for any citizen affected by the operation.

THE COURT:

Well, there are many things to follow this logically for a moment, there are many things that municipalities don't do now. Are people being advised it is their Constitutional right because they don't do those things?

MR. BRIAN:

No sir. I am dealing with the facts as they are, a hypothetical situation. In this case, the City of Tallahassee has provided money and has built and operated swimming pools for the benefit of all (35) the citizens of Tallahassee and has taken steps -- and here again, I remind Your Honor, that this motion we must assume is true that they deliberately and intentionally closed these pools for the specific purpose of denying certain negro children the right to use these pools on a discriminatory basis. I would say that having built these pools and operated them they cannot close them for that unconstitutional purpose.

THE COURT:

Mr. Brian, granting you for a moment the apparent absurdity on the face of the thing, of the City having swimming pools closed down, no one using them, just assuming for a moment that this Court no less than anyone else could be observant of the ultimate fact that the apparent absurdity of such a situation, granting all that, is it your contention, for whatever reason it may be, that this situation has got to be corrected about Constitutional enforcements of edicts of the court? This is disturbing to me, frankly, because I don't believe the Courts, here or (36) anywhere else, are going to be able to solve all the absurdities that life encompasses with it. This is disturbing to me because the very fact the Constitution itself, while elastic, it has its tearing points and if we are to indeed invoke into the stream of the judicial grants all of the aspects of righting a wrong and issuing every direction to correct an absurd or improper condition, then I think we might well abrogate all responsibility for any other branch of the government. We would have no use for Congress, Legislators, or Mayors, or anyone else, just come over to the courthouse and get an order because this thing is absurd.

MR. BRIAN:

I appreciate it, Your Honor, your comments are well made. However, I think even in the exercise of appropriate provisions is the same, in view of the court granting another, that there are situations that I could mention, one is the only way in which the rights complained of is through the courts. We have no other way of seeking relief except (37) through this court and then the higher court to test that right.

THE COURT:

I think the power of the electorate is a very strong way to express its views and I think gets results.

MR. BRIAN:

Well sir, may I -- I don't think I have to remind Your Honor, that again giving you specifically the city which we are here dealing with, higher electorate is not one that can be brought to bear on the representatives of the people in such a way as to protect the one segregated population which has had its right denied.

THE COURT:

Well, it is admitted that both of us are unsupplied with the facts on these things --

MR. BRIAN:

These are legal arguments.

(38) THE COURT:

I think that this is somewhat a philosophical point of view I share, it is long believed that the electorate can be heard and is heard. I think that those who are elected to public office do respond and respond promptly to the wishes of the people that express it publicly. I think this is inherent on the system.

MR. BRIAN:

I want to go on just a bit with the Griffin case to point up certain analogies in the present situation what I am inquiring from Your Honor. I think first of all the argument can be made, if it has not been made today, the Griffin case is different from our case because there was a duty upon a county or some other governmental body to provide free public education and there was no duty whatsoever upon any governmental body, certainly not upon the City of Tallahassee, to provide swimming (39) pools for the children of the City of Tallahassee, I say that is not a point of issue because it is quite clear in reading of the Griffin case there was no duty on the county to provide public instruction and the Supreme Court of Virginia --

THE COURT:

Well, they said it was the duty, however, of the State if they went into the education business. I am familiar with the Prince Edward County case. As I understand the basic holding there was if the State of Virginia was going to involve itself with the problems of public education at all, that it could not do so by the manner of devised there employed in Prince Edward County and that is simply about what the case stands for -- they say, you are either in the education business on a completely non-discriminatory basis with the full guarantee of the

Constitutional Amendments or you are not, and they didn't meet that particular test. In other words, they got into the education business and they were in it while they were operating these things one way in Prince Edward (40) while they were operating them in another manner in Richmond and other places. Now, here, we haven't got that situation. We have got three pools and they are all closed.

MR. BRIAN:

Well, it is analogous because of the fact Prince Edward did run public schools, that is the whole point of the case. Let me read a portion of the opinion, I quote from the opinion at page 265:

> "But the record in the present case could not be clear that Prince Edward schools were closed and private schools operated in their place in state and county, for one reason and one reason only, to insure through measures taken by the county and state that white and colored children in Prince Edward County would not, under any circumstances, go to the same schools."

We say there is no real honest distinction between the situation here and the situation in Prince Edward County in the Griffin case, but I submit that going beyond the Griffin case there are additional reasons why unequal treatment, despite a line of cases preceding the Griffin case, say there were no discrimination. There is good reason one might conclude that there is unequal treatment in the opening and closing of schools.

If the Court allows this closing to stand it seems to me realistic and failure to assume that the negro population of the City of Tallahassee, or any citizen in this situation if it occurs, would be precluded from exercising their right to integrate public facilities. They would then be under a threat of the immediate closing wherever they intended to exercise their right of a facility that was open. They would be deprived of any facility whatsoever which were closed. These arguments are, in my opinion, Your Honor, sufficient answer to the Tonkins case.

(42) I will just briefly refer to the cases upon which Tonkins relies, Clark v. Flory, briefly a case in which a suit was brought to desegregate a beach resort, I believe in the State of South Carolina. While the suit was pending the legislature enacted a law which closed completely the beach resort and specified that it was not to be opened until further enactment by the legislature. Now, when the case reached the Court, the Court said two things -- first of all, that prior judgment, and more important that the case was moot. I think Mr. Rhodes made that argument in his argument. But in the analysis of this case again will show Your Honor that the relief requested in Clark v. Flory is not the same relief we request here, the relief

requested in Clark v. Flory was that desegregated use be ordered by the Court. Now, we are asking for a different type of relief. We are not asking for desegregated use, we are asking for the reopening, which I submit is (43) different from the relief sought in Clark v. Flory. I just want at this point to discuss briefly our situation with respect to our Motion for an Injunction-- I take it that we have completed arguments on the Motion to Dismiss. Our position is that we want to conclude that. We have a valid cause of action stated, there is a valid cause of action stated, then I think it follows necessarily immediate injunctive relief would be appropriate and necessary here. Swimming pools are made to swim in and it is now July 16th, half the summer is gone, irreparable harm has been suffered by these plaintiffs. I don't think I have to elaborate on the basis. I just want to say one final thing, I sincerely feel there is no case on one point, I mean there is no case which says a Federal District Court has the right to rule on a swimming pool.

THE COURT:

On the contrary, there are cases which do in the Fifth Circuit, which has jurisdiction over this Court.

(44) MR. BRIAN:

I freely concede, Judge, that there are such cases. I think I have carefully delineated the history of the cases.

THE COURT:

I appreciate your candidness Mr. Brian.

MR. BRIAN:

Hosever, I do say our case is based squarely on the underlying philosophy of the Griffin case, which says --

THE COURT:

It is unconstitutional -- the Act is unconstitutional. I got your point.

MR. BRIAN:

And further, that the District Court has a right to order reopening and a further right to insist that the local taxing body appropriate money to support and maintain it, the facility. Now, I say this case like the Griffin case -- I believe that the (45) Griffin case represents a further extension of the Fourteenth Amendment and it is sound law and binding upon this Court. I would hope that this Court would have the power of enunciating the principles to establish in a public facility, such as a swimming pool -- the Court does have the power to reopen these pools and to deny and strike down the injusctice, unequal treatment, afforded all citizens in the City of Tallahassee.

THE COURT:

Mr. Brian, I thank you, and I want to say this to that last you said. This Court has no timidity about enforcing Constitutional Rights, indeed it had occasion, in the last month I believe, to first construe the Civil

Rights Act with respect to another field of activity, the first in the country, and upheld the constitutionality of the Civil Rights Act with respect to certain related activities; that is, with respect to barbering in hotels and motels, so there is no timidity on the part of this Court by carrying out what it sees to be the law. Nor is there (46) any timidity in the consequences of denying relief where I feel the law is to the contrary.

MR. BRIAN:

May I express my pleasure and gratitude to Your Honor in your consideration of an out-of-state lawyer and it has indeed been a pleasure to be before Your Honor in your court.

THE COURT:

Thank you.

MR. RHODES:

May it please the Court, we have several brief points which I would like to make, in conclusion.

Initially, addressing myself to the Griffin case, decision, I think this is completely inapplicable, and its inapplicability is clearly indicated in two ways. One being in the field of education itself; and the second I feel more significant and important, referred to by opposing counsel, (47) reading from the decision itself, in which the United States Supreme Court acknowledged that it was dealing with a situation in which State and County assistance was being given to private schools. We are confronted with the situation here in which the City of Tallahassee lease, a long term lease, or sold to private operation, would be operating on the same segregated basis and continue to support such a facility with public funds. There is no question of the applicability of the principle I refer to in that. Such, however, is not the case.

In the other area dealing with the recognition of the unconstitutionality of an objective to deprive persons of their right to the Fourteenth Amendment, I call the Court's attention to the fact that in each of those cases, each of them involve a situation in which something was involved, using the simming pool as an illustration -- wher a facility once operated by a governmental agency or municipal, State or county, was then leased or (48) sold and continued to be used for the purpose for which it was intended to be used and the continuation of that governmental involvement in a segregated condition was what was stricken out by the Fourteenth Amendment. Now, certainly it stretches my imagination considerably to see how these parties claimed in this cause, and by any stretch of the imagination, say that at the time of the filing of this suit they were being treated unequal to anyone else in the City of Tallahassee so far as these swimming pools are concerned. The Court's attention is again invited to the Clark v. Forey case which is quite analagous.

THE COURT:

What is the citation on it, if you have it?

MR. RHODES:

237 Fed. (2d) 597. This was a Fourth Circuit decision involving the Legislative Act in which the Court recognizes the proposition being moot.

(49) THE COURT:

Judge Sobell wrote that opinion. I am familiar with that.

MR. RHODES:

This is a proposition that would be support in many other cases within the Fifth Circuit.

In conclusion, the Court's attention is called to Montgomery v. Gilman, 277 Fed. (2d) 364.

THE COURT:

Give me that again.

MR. RHODES:

Montgomery v. Gilman, 277 Fed. (2d) 364.

THE COURT:

Do you happen to have the City of Jacksonville case?

MR. RHODES:

Yes sir.

THE COURT:

The citation I mean.

(50) MR. RHODES:

Hampton v. City of Jacksonville, 304 Fed. (2d) 319.

This is where the Fifth Circuit affirmed it. There is no continuing citation for Jacksonville discontinuing use of its swimming pools under an order involving total recreational facilities of the City of Jacksonville, where the City of Jacksonville closed down this portion of its city recreation.

In the Montgomery v. Gilman case, involving the closing of the parks in the City of Montgomery, Chief Justice Rives commented:

> "A city is not required to operate public parks and the closing of parks to persons of all races does not deprive citizens of equal protection of the law."

THE COURT:

Judge Rives?

MR. RHODES:

Yes sir. That is the law that covers (51) this situation.

THE COURT:

You want to say something else, Mr. Brian?

MR. BRIAN:

The only thing I want to inquire-- I know you are leaving on a trip Sunday or Monday -- I hope Your Honor will make your decision prior to your departure.

THE COURT:

Well, certainly I hope that I can. I do want the benefit of -- I think that I have got your citations -- I will go right into those.

MR. BRIAN:

I will have our brief here by 2:00 PM.

THE COURT:

I hope to do so. You can't run a Court, of course, like you would a Ford Motor Company production line. I will try to get it out as soon as (52) I can and give it to you with due consideration to the matter that this concerns. In the event I take it under advisement, I will take it with me, and if I file it it will be filed here promptly and it will be a matter of public record and there will be no undue delay.

MR. BRIAN:

Thank you, sir.

THE COURT:

Is there anything further to come before the Court?

MR. RHODES:

No, Your Honor.

MR. BRIAN:

No, Your Honor.

THE COURT:

Court will be in recess.

(Whereupon Court stood
adjourned until further order)

- - - - -

(53) I, HATTIE BELL LOVE, do hereby certify that the within and foregoing constitutes a true and correct transcript of my shorthand notes and Audograph recording taken on July 16, 1965, in Tallahassee Civil Action No. 1073, ROCHELLE STEEL, ET ALS., VS. GEORGE B. TAFT, MAYOR OF THE CITY OF TALLAHASSEE, ET AL., on MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

This December 16, 1965.

s/ Hattie Bell Love
OFFICIAL COURT REPORTER

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROCHELLE STEELE, DARRYL STEELE, both minors
by Reverend C. K. Steele, their
father and next friend,

and

SADIE ESTELLE GORDON,

CIVIL CAUSE

Individually and as representatives
of a class

NO.________

Plaintiffs

VS.

GEORGE B. TAFT, Mayor of the City of
Tallahassee, and Commissioner
of the City of Tallahassee, State
of Florida

and

ARVAH HOPKINS, City Manager, City of
Tallahassee, State of Florida

and

HUGH WILLIAMS, Commissioner of the City
of Tallahassee;
JOE CORDELL, Commissioner of the City
of Tallahassee;
DAVID ATKINSON, Commissioner of the City
of Tallahassee;
WILLIAM H. CATES, Commissioner of the City
of Tallahassee, State of Florida

and

FRANK STOUTAMIRE, Chief of Police of the City
of Tallahassee, State of Florida

and

RECREATION BOARD, City of Tallahassee;
JAMES HARDAWAY, RECREATION DIRECTOR, City of
Tallahassee;
LESLIE ABSTEIN, ROY BERRYM, DR. T. J. BIXLER,
W. P. STILL, and BILLY OWENS, members
of the RECREATION BOARD, City of
Tallahassee
MAX HUMPHREY, Chairman, Park Board of the City
of Tallahassee
MRS. D. FRED MC MULLEN, and MRS. ERNEST W. CARSON,
members of the Park Board, City of
Tallahassee, State of Florida

COMPLAINT

and

WADE WEHUNT, Department Head, Swimming Pools,
an employee of the CIVIL DEFENSE
DEPARTMENT, City of Tallahassee,
State of Florida

Defendants

I

Jurisdiction of this court is invoked under the Fourteenth Amendment to the United States Constitution and Title 28, United States Code, § 1331 (a), 1343 (3), and

1343 (4), 1357, 2201, 2202, 2281, 2284, Title 42, United States Code, § 1981, 1983, 1985 (3) and 1988.

II

The matter in controversy exceeds the sum of ten thousand dollars, exclusive of interests and costs.

III

Plaintiff brings this action on his behalf and on behalf of others similarly situated pursuant to rule 23 (a) (3) of the Federal Rules of Civil Proceedure. There are common questions of law and fact affecting the right of other Negro persons who are deprived of or threatened with the loss of their right of the equal protection of the laws, on account of their race and color by being denied equal utilization of public facilities which are owned, operated, or managed by or on behalf of the state or subdivision thereof, who are so numerous as to make it impractical to bring them all before this court. A common relief is sought. The interests of said class are adequatley represented by the plaintiffs.

who are plaintiffs children and depriva

IV

This is a proceeding for an injunction restraining defendants from continuing or maintaining, any policy, practice, custom, custom and usage of withholding, denying, attempting to withhold or deny, or depriving or attempting to deprive, otherwise interfering, with the rights of the plaintiffs and others similarly situated, of equal utilization of a public facility which is owned, operated, or managed by the City of Tallahassee, State of Florida, to wit: recreational facilities comprising three swimming pools; without discrimination or segregation on the grounds of race or color.

V

The plaintiffs are of the Negro race, residing in the City of Tallahassee, State of Florida, and are citizens of the United States. Plaintiff Sadie Estelle Gordon is of full age; plaintiffs Rochelle Steele and Darryl Steele, are infants under the age of twenty-one, who are suing by their next friend, Reverend C. K. Steele.

VI

Defendant George B. Taft is the Mayor of the City of Tallahassee and has general supervision of the Police Department, and defendant Frank Stoutamire, is Chief of Police, of the City of Tallahassee, and they are charged with the enforcement of the state laws of Florida and the City Ordinances of the City of Tallahassee. Defendants are sued in their official capacity.

VII

Defendant Arvah Hopkins is the City Manager of the City of Tallahassee and is the chief administrative officer of Tallahassee. He holds office at the pleasure of the City Commission and acts as administrative leader under the direction and supervision of the City Commission. He is in charge of the Recreation Department, Swimming Pools Department, and Parks Departments. It is the City Manager's duty to keep the City Commission fully advised as to the financial condition and needs of the city and to submit for its consideration an annual budget. The said defendant is sued in his official capacity.

VIII

Defendants Hugh Williams, Joe Cordell, David Atkinson, and William H. Cates, are Commissioners of the City of Tallahassee and are charged with the enforcement of the laws of the State of Florida and serve the legislative function of municipal government. Said defendants are sued in their official capacities.

IX

Defendant Recreation Board, is a public body created and existing under the laws of the State of Florida and Code of the City of Tallahassee, for the purpose of maintaining public recreational facilities in the City of Tallahassee. JAMES HARDAWAY, is RECREATION DIRECTOR; LESLIE ABERSTEIN, ROY BERRYM, DR. J. T. BIXLER, W. P. STILL, and BILLY OWENS, are members of the RECREATION BOARD. Said defendants are sued in their official capacity. The Recreation Director and members of the Recreation Board are shown on the face of the complaint and are sued in their official capacity.

X

Defendant Park Board of the City of Tallahassee, is a public board created, or regulated and controlled, and existing under the laws of the State of Florida and Code of the City of Tallahassee, for the purpose of providing and maintaining park facilities in the City of Tallahassee. The members of the Park Board are shown on the face of the complaint and are sued in their official capacity.

XI

Defendant Wade Wehunt, is Department Head of the Swimming Pools Department, and also is associated with the Civil Defense Department of the City of Tallahassee and an essential purpose of the Swimming Pools has been to participate each year in a nationally recognized Water Safty Program including swimming and life saving instructions. The defendant is sued in the official capacity he has with the City of Tallahassee.

XII

On information and belief, aforesaid swimming pools were constructed, supported and maintained by public funds, and are essential for the health, education, safty and welfare of the citizens of Tallahassee.

XIII

Heretofore the City of Tallahassee owned and operated, and presently owns and operates numerous recreational facilities, located within the City of Tallahassee, for the general use of the residents ? City of Tallahassee and that among the aforedescribed recreational facilities are three swimming pools, their being Myers Park, Levy

Park, and Robinson Trueblood, the first two of which were solely for the use of white persons; Negroes not being permitted by the City of Tallahassee, the defendants, their agents, representatives and employees, to use same.

XIV

The City of Tallahassee and the aforesaid defendants, while acting under color of law in their official capacities have been and are enforcing a policy, practice and custom of discrimination against plaintiffs, because of race, in the utilization of swimming pools and have deprived the plaintiffs of privileges and immunities granted to every citizen including the plaintiffs, and equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution and by reason of Section 1342 of Title 28 of the United States Code, and Section 1983 of Title 42 of the United States Code as herein more fully appears.

XV

That heretofore the City of Tallahassee in violation of the Fourteenth Amendment to the United States Constitution, and Section 1983 of Title 42 of the United States Code, deprived the Negro citizens of the City of Tallahassee of equal protection of the laws and discriminated illegally against them by denying them the right, as a class, and individually to use certain of the recreational facilities, more particularly the aforesaid swimming pools designated for white persons only.

XVI

That on or about the Fourth day of July, 1964, a group of Negroes attempted to utilize Levy Park Pool, one of the above swimming pools; immediately, that same afternoon, City Manager Arvah Hopkins ordered all three swimming pools closed. And that said pools have been closed ever since and defendants have refused to open same

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROCHELLE STEELE, DARRYL STEELE, both minors by Reverend
C. K. Steele, their father and next friend,

and

SADIE ESTELLE GORDON,

Individually and as representatives of a class

Plaintiffs

CIVIL CAUSE

NO.________

VS.

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Commissioner of the City of Tallahassee,
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and

ARVAH HOPKINS, City Manager, City of Tallahassee,
State of Florida

and

HUGH WILLIAMS, Commissioner of the City of Tallahassee;
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DAVID ATKINSON, Commissioner of the City of Tallahassee;
WILLIAM H. CATES, Commissioner of the City of Tallahassee,
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and

FRANK STOUTAMIRE, Chief of Police of the City of Tallahassee,
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RECREATION BOARD, City of Tallahassee; JAMES HARDAWAY,
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MAX HUMPHREY, Chairman, Park Board of the City of
Tallahassee
MRS. D. FRED MC MULLEN, and MRS. ERNEST W. CARSON, members of
the Park Board, City of Tallahassee, State of Florida

COMPLAINT

and

WADE WEHUNT, Department Head, Swimming Pools, an employee
of the CIVIL DEFENSE DEPARTMENT, City of Tallahassee,
State of Florida

Defendants

SHOW CAUSE ORDER

Good cause appearing therefor and upon the verified complaint filed herein;

IT IS HEREBY ORDERED THAT the defendants herein, through their counsel, appear before this Court on the ________ day of___________________, 1965, at the hour of _________o'clock, _______________M. of the said day, at the United States Courtroom, _________________, Florida, to show cause, if any they have, why a temporary or permanent injunction should not issue against them as prayed for herein.

Done this ________day of _______,1965 at ______, Florida.

JUDGE, UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER

WHEREAS, in the above named cause it has been made to appear by the verified complaint filed herein, which was on this____________________day of ____________, 1965, presented to the Honorable______________________________, Judge of the United States District Court for the Northern District of Florida that restraining order preliminary to hearing upon motion for a preliminary injunction should issue because immediate and irreparable injury, loss or damage will result tothe plaintiffs in that they are being denied rights to full and equal enjoyment of the services, facilities, privileges, advantages and accomodations of the defendant, City of Tallahassee Swimming Pools.

NOW THEREFORE, on motion of the plaintiffs verified complaint filed therein, their agents, successors, deputies, servants and employees, and all persons acting by, through, or under them, or either of them, or by or through their order, be and they are hereby restrained until__________ ____________________________ from (a) selling or offering to sell the swimming pools of the City of Tallahassee; (b) permitting or granting the right to any party, person, or groups of persons to utilize the Swimming Pools of the City of Tallahassee with the result of discrimination against persons because of their race or color.

VERIFICATION

FLORIDA, LEON COUNTY:

PERSONALLY APPEARED before me the undersigned authority, and after being duly sworn deposes and says that he is the plaintiff in the above and foregoing complaint and that the facts alleged therein are true.

____

Subscribed and sworn before me, this ____________ day of ____________, 1965.

____

____

Notary Public

CONTRACT BETWEEN ATTORNEY AND CLIENT

It is hereby agreed between the party of the first part, indicated below as signees under the category client, and party of the second part to wit Attorney John D. Due, Jr.; that (1) the party of the first part retains the party of the second part on their behalf against the City of Tallahassee to protect and defend their civil rights, with power to the said John D. Due, Jr. to associate with Attorney Carl Rachlin and other attorneys as he may see fit; (2) that damages received from the action against the City of Tallahassee pursuant to the protection and defense of their civil rights be divided equally between the Congress of Racial Equality and the Southern Christian Leadership Conference; (3) that reasonable attorneys fees recovered from the action against the City of Tallahassee for the attorney John D. Due, Jr. be donated to the CORE Scholarship Education and Defense Fund to which and evermore the said John D. Due, Jr. claims only title to as a trustee on behalf of the CORE Scholarship Education and Defense Fund.

Party of the first part	Party of the second part
client	attorney
client	
client	
client	
client	
client	

XIX

The plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgement: 1. Declaring the practice, policy and acts of the City of Tallahassee and their defendants as above recited to be unconstitutional. 2. That the defendants, their agents, representatives employees and all people acting in their behalf, either directly or indirectly, be ordered and directed to re-open the said pools on a non-discriminatory basis without regard to race, color or creed. 3. Pending the trial of this action, temporarily enjoining the City of Tallahassee and said defendants from: (a) selling or offering to sell the swimming pools of the City of Tallahassee; (b) permitting or granting the right to any party, person, or group of persons to utilize the swimming pools of the City of Tallahassee with the result of discrimination against persons because of their race or color. 4. Awarding plaintiffs judgement for the sum of fifty thousand dollars ($50,000.00) damages, compensatory and punitive, as well as this litigation, including reasonable attorneys fees, plus the cost of this action. 5. Awarding plaintiffs such other and further relief as may be just.

Respectifully submitted,

John D. Due, Jr.
540½ West Brevard Street
Tallahassee, Florida

Carl Rachlin
38 Park Row
New York 38, New York

unless

Attorneys for Plaintiffs

XVII

That said closing of the aforesaid swimming pools was solely for the purpose of depriving the plaintiffs and the class they represent as aforesaid, of equal rights and equal protection of the laws and privileges and immunities; that the object of the closing of the pools was not a constitutional one but was done purposely and deliberately on the grounds of race and opposition to desegregation; that the object and effect of the closing of the swimming pools is to deny equal utilization of the recreational facilities of the three swimming pools; that unless the defendants, their agents, representatives, or other persons acting in their behalf and name or on their behalf whether directly or indirectly are restrained and enjoined from continuing their acts of discrimination against plaintiffs and the class they represent as described aforesaid, in closing the said swimming pools, and unless defendants are directed and ordered to reopen said pools to be used by persons entitled thereto regardless of race, color, and without discrimination; plaintiffs and the class they represent, shall be deprived illegally of equal protection of the laws and privileges and immunities, as guaranteed by the Constitution of the United States and the statutes thereunder.

XVIII

The plaintiffs and those similarly situated have suffered damages by reason of action of said defendants and will have suffered irreparable damages unless defendants are enjoined from continuing such damages; and the plaintiffs have undergone and will continue to undergo unnecessary expenses and legal fees of the amount approximating the sum of ~~five~~ Ten thousand dollars ($5,000.00) because of the illegal acts of the defendants as described above.

Comes now the Defendant, Arvah Hopkins, City Manager, City of Tallahassee, State of Florida, by and through the undersigned attorneys and respectfully moves this honorable court to dismiss this cause on the ground that the Complaint heretofore filed herein fails to state a cause of action upon which the releif sought by the Plaintiffs herein can be granted.

Roy T. Rhodes
102½ South Monroe Street
Tallahassee, Florida

Rivers Buford, Jr.
404 Midyette Moor Building
Tallahassee, Florida

Attorneys for the above Defendant

I hereby certify that copies of the foregoing motion to dismiss have been served by mail on John D. Due, Jr., 540½ West Brevard Street, Tallahassee, Florida; Bruce Rogow, 540½ West Brevard Street, Tallahassee, Florida; and Carl Rachlin, 38 Park Row, New York 38, New York, this 14th day of June, 1965.

Attorney

Comes now the Defendant, **GEORGE E. TAFF, Mayor of the City of Tallahassee, State of Florida**, by and through the undersigned attorneys and moves this honorable court to dismiss the Complaint heretofore filed herein on the following grounds.

1. Insufficiency of process as to this Defendant.

2. Insufficiency of service of process as to this Defendant.

3. Failure of the Complaint to state a cause of action against this Defendant upon which the relief sought may be granted.

Roy T. Rhodes
102½ South Monroe Street
Tallahassee, Florida

Rivers Buford Jr.

Rivers Buford, Jr.
404 Midyette Moor Building
Tallahassee, Florida

Attorneys for the above Defendant

I HEREBY CERTIFY that copies of the foregoing motion to dismiss have been served by mail on:

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Tallahassee, Florida

Carl Rachlin
38 Park Row
New York 38, N.Y.

this 14th day of June, 1965.

Attorney

DICTOPHONE FROM NYC JULY 15, 1965

STATEMENT OF FACTS →

ON the after noon of JUly 4, 1964 the City Manager ~~seven public officials~~ of the City of Tallahassee, perpetuating the policy, ~~or~~ practice, and custom of discrimination of public facilities, closed the three municipal swimming pools: Myers park and Levy park, all white pools, and Robinson Trueblood pool, AN ~~and~~ all-Negro pool. Earlier that day, two days after the President signed the Civil Rights Act of 1964, authorizing in Title III the Attorney General to file ~~complaint~~ suit to enjoin such discrimination, plaintiffs, Negro residents of Tall., attempted to exercise their constitutional ~~right~~ and lawful ri right to use the all-white Levy park ~~Levy park~~ swimming pools. They were immediately denied the right to use the pool and that same afternoon the City Manager ordered all three pools closed and they have remained closed since that date. The only reasonable inference from this sequence of events — the passage of the civil rights act, the thwarted attempt to enter the pools on the morning of July 4th, and the closing by the City Manager that same afternoon, is that the closing was part of the policy of perpetuating disc. in public facilities on the basis of race in violation of the Fourteenth Amendment of the U.S. Constitution and the law of the land.

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center caps

Acts generally lawful may become unlawful.

Plaintiffs ~~do not~~ nor can they assert that it would be illegal under any circumstances to close the public swimming facilities in Tall.

Under a broad range of circumstances closing these facilities would be legal and perhaps even commendable . Plaintiffs would not question the legality of closing the pools in case ~~the case~~ of a drought, or epidemic, but it is a legal truism that " acts generally lawful may become unlawful when done to accomplish an illegal end and a constitutional power cannot ~~be~~ be used ~~[illegible]~~ by way of condition to attain an unconstitutional result" ¶ Western Union Telegraph Co v. Foster 247 U.S.105 (~~at~~ p. 114), 38 Sup. Ct. 438 (~~at~~ p. 439) (1918) 247 LED 1006 @ 1016 (1918) ~~Justice Holmes)~~. The legality or illegality of an ~~ab~~ act depends not only on the nature of the bare act itself, isolated from the context which gives it meaning, ~~but~~ also on all the circumstances surrounding the act including the intended and actual result. ONly ~~I~~ by considering the context of an act can ~~the~~ a court deal with ~~the~~ substance and not mere form. Thus in most contexts there would be nothing illegal in building a new school, in leasing a swimming pool or golf course, or in closing a manufacturing pla~~i~~nt. Yet these act~~s~~ have been held illegal when the context of these acts rendered the acts illegal. ~~Taylor~~ ~~[illegible]~~ Taylor v. NewRochelle (building a new school); ~~[illegible]~~ ~~76 F. Supp. [illegible]~~ Lawrence v. Hancock, (leasing a swimming pool); Sim~~k~~kins v ~~City of~~ ~~14 F. Supp. [illegible]~~ Greensborou, (leasing a golf course); Textile Workers Union of AMerica v. Darlington Manufacturing Company, ~~86 S. Ct. [illegible]~~ 115 et al. (closing a manufacturing pla~~n~~nt)

Center caps

~~DEFENDANTS'~~ RIGHT IS LIMITED BY THE CONSTITUTION

It is no answer for defendants to claim ~~a~~ the right to do ~~the~~ a particular act. ~~Defend~~ Defendants' right, like the legality of their act, cannot be ~~waived~~ considered in a vacuum . When the context is unlawful, the right no longer exists. Defendants' power over the swimming facilities, no matter how broad, can never transcend the limitations set by the Fourteenth Amend. The courts have declared that the power to ~~lase~~ lease does not include the power to discriminate aginst members of a minority race in ~~their~~ the exercice of ~~these~~ their constitutional rights, nor can the city by such a lease .... ~~release~~ relieve itself from ~~the~~ its constitutional obligation to afford all its citizens equal rights in the use of the public swimming pool~~s~~ which is the subject of the lease." Lawrence (W) v. Hancock supra, p. 61. NOr does the power to sell "include the power to discriminate against members of any race". Tate v. Dept. of Conservation and Development ~~Dev~~. 133 F.Supp. 53, 1955 Dist. Ct. (va.). It cannot be conceived ~~There is no conceivable~~ reason why ~~the power to close out~~ that the power to lease or to sell may ~~should~~ include the power to discriminate.

Center

PLAINTIFFS' RIGHT NOT TO BE DISCRIMINATED AGAINST

Plaintiffs' right, like the defendants', must be considered in context. Obviously there is no abstract constitutional right to swim at public expense. Plaintiffs neither have nor claim an absolute right that the city of Tall. build and operate swimming pools. Clearly, they do have the right, which they plead that this court uphold, to swim in pools which were denied to them and which were ~~and then~~ closed altogether for the sole purpose of discriminating against the plaintiffs and the members of their class. Plaintiffs' moral and constitutional right not to be discriminated against, not an abstract right to swim, is at issue. The existence of the one is not conditional upon the existence of the other. The Supreme Court has so held in analogous cases. For example, it is axiomatic that no man has a right to government employment. The federal government ~~and state gov't actions(?) statutes to the contrary,~~ may fire a man for ~~in good~~ cause or without cause, but he has the right not to be fired for an illegal cause.

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose ~~cover persons to the~~ exclusion pursuant to a statute is patently ~~passively~~ arbitrary, or discriminatory ~~explanitory~~.

Wieman v. Updegraff 344 U.S. 183 1952. See also Torcaso v. Watkins 367 U.S. 488, 81 Sup. Ct. 1680 1961 →

reaffirming constituiional right not to be discriminated against in an activity exists irrespectivè of whether the activity is in itself a "protected ritht" under the Consitkution. (Wieman-Uptegraf-Torcaso) (Watkins) The right not to be i discriminated against is a "protected right" .

Viewed either in terms of the legality of the act given the unconstitutional purpose and effect or in terms of plaintiffs and defendants respective right the result remains the same, defendants right to close is necessarly subordianate to plaintiffs constitutionally protected right not to be discrimnated against at defendants action because of its purpose and effect was illegal.

DEFENDANTS MOTIVE IS UNCONSTITUTIONAL

If the defendants ~~[illegible]~~ discriminatory motive behind closing the swimming pools almost immediately after the plaintiffs attempt to exercise their constitutional right to equal utilization of the Levy Park pool is examined by this court it can and should be evaluated as state action in violation of the Fourteenth Amendment actual or intended state or municiapal action have been evaluated in analogysis situations in terms of motives or purpose and have been suspended or invalidated by b federal courts. See for example Tate v Der Derrington, full mx names of the case ______cite will follow. Although the court in Derrington v Plumer focus on the issues of whether the discriminatery acts of an apparently private lessee could be deemed state action and ____________no purpose of discriminatiqn

IE

on the part of the county in leasing the property is carefully trusts the importance in adjudicating the propriety of state actions under the Fourteenth Amendment stating :

> "When (there is) no purpose of discrimination, no joinder in the enterprise, or reservation of countrô by the xxxxxxx county is a lease for private purposes"

Wdh While this court may note xxxx that closing and leasing (or sale) are distinguishalbe x in operative effect it should also rule that "purpose of discrimination is a singular basis for invalidating state action apart o from the effect noting that the court in Derrington used purpose, xx joinder, or reservation in the alternative and aside singular should be substituted for by suspicion. Whether the pools are closed and put out of operation entirely or leases or seled to a pravate person who will or can discriminate the discriminatory motive are the same in closing as in leasing or selling is determative so xxxxxxx colors the defendants act and the situation with bad faith in violation of the consitiutiion that it cannon be upheld by the court. ¶ Tate strongly conferms the view that the underlying purpose of an act or the "fundamental reason" behing the action not only b can be examined by a court but wx will determine the outcome of the case

> "It is purposely apparent to the court that the fundimental reason for the contemplated lease lies in the problem of use by the members of all races ...the proposed "xxxxxxxxxxx negotiated" lease effectively set, in the hands of a x small group the power to accomplishxhim by indirections exactly what the courts have said cannot be done" cite Tate

Thus the court enjoin the county from leasing to an unknown lessee that is preventive in making the lease with any leassee because of the underlying intent of the county the potential lessor similarly in Simkins to be cited later where the court injoined a lessee from operating on a discriminatory basis it examined the motives behing making the lease in the first place: ...it also lends powerful weitht to the inference that the lease was resorted to in the first instance to [illegible] b obey the cities duty not to discriminate against any of its citizens in the enjoyment of the use of the park pg 565 (quote has to be checked) Finally the supreme court of the U. S. in Price Edward County did not hesitate to examine and condem the objectives and mmotives behind the schools closing;

> "but the record in the present case could not be clearer that Price Edward public schools were closed... for one reason and one reason only; to insure, through measures taken 1by the county 1 and the state, that white and colored children in Price Edward county could not, under any circumstances go to the same school what ever grounds by support allowing the city to abandon public schools, the object would be a constitutional one and grounds of race and oposition to desegregation do not quality as Constitutional" pg 1233 (needs checking for exactment)

This language of the supremen coutr can be decisise on the issue of closing in the case in bar. Plaintiffs position is that the city closed the pools to insure 1that white and colored persons in Tallahassee would not under any circumstances w swim in the [illegible] same pool.

Discriminatory effect of the closing

The affect of the second act

THE DISCRIMINATORY EFFECTS OF THE ELOSING

THE affect of the second act in closing the pools, like their right to close the pools, must be analized in overall ______________. These affects viewed in the ERASE ! Viewed in this context there are really two dascriminatory effects. They are 1) intimidation and 2) segregation by indirection. Public swimming facilities represent only a fraction of the total municipal picture . And second(?) by closing one facility implicitly threatens to close others. Negro residents even without explicit threat being made, but necessarily calculate if this closing is tolerated by the court , whether the risk of being completely deprived of an important public facility outweighs the importance of exercicing their right to equal utilization. Furthermore, this court cannot close its eyes to the act that defendants closed, the pools. The realization that the efect would be to compel whites to use private swimming pools, but to deny both Negores to use any swimming pools at all. It is through such technics that patterns of seg., outlawed ______________, survive and insuriving calcifying the anachronistac human attitudes behand them.

(I'd like to put an aside her as to what we're doing) The effect ______________what we call surragates(?) right by indirectionis that white people in the past instances of closing have had other places to g and Negroes have not , having therefore total deprivation. The intimidat effect is that Negroes would rather have the facilities on a separate ba than not have them at all and they will be afraid to exercice their right if not accepted on the golf course, park

DARLINGTON MANUFACTURING compANY CASE SETS PRECEDENT FOR RE_OPENING FACILITIES CLOSED TO EFFECT DISCRIMINATION

The discriminatory effect of the swimming pool closing lies in part in the prohibitive effecks on efforts to gainlawful access to whatever othe municipal facilities and institutions are operated on a segregated basis. The closing of one type of facility where the purpose and result to intimidate citizens from exercicing their legal right to utiliation of the faiilities as been forbiddenby the Sup. Ct. even when plaintiff's legal right is merely statuatory and defendent is not a municipality with a public function but a private corporation.

In Textile Workers Union v. Darliggton Manuf. Co 85 Sup. Ct. 994 1965 defendent, the employer closed one of several manuf. plants in response to employees' exercice of their right to organize. The court made it clear that if the plant closed by a single employer, for discriminatory purposes and it would effect employment in the rest of the enterprise and discourage employees from attempting to exercice their legal right to organize, the closing could be enjoined. That's it for the clarificatic

> " a discriminatory partial closing may have repercussions of what remains of the business affording employer (?) coverage for discouragein the freee exercice of .....right among the remaining employees....a partial closing is an unfair labor practice under Sec. 883 if motivated by a purpose to ______________any of the remainginy plants of a single employer and if the employer may reasonable have foreseen such a closing will likely have that effect."
>
> Darlington p. 1002

Defendent reasonableycould have foreseen that Plaintiff; and the others of their class cannot really exercise their right if they fear that a special facility may be closed to them altogether. If plaintiff's first choice, which is moral and constitutional right to use public facilities on a non-discriminatory basis is denied, their second choice may have to be to accept unconstitutional discriminatory use; that is,use on a separate basis, rather than no use at all. Defendants then plan to $$$$$$$$ accept separate sep. facilities or none at all. Thus def. have attempted to exploit plaintiff's need for recreational and other facilities [redacted]

THAT DAMN CROWS#$%$&**(SORRY,ROOSTERS$#%$$*&(([redacted]

________________________________ Deering -Milliken, Def. in the Darlington case attempted to exploit their employees ____________________

If the court can enjoin the closing $$ of a plant to protect a statuatory rights$, a ~~priori~~ fortiori they should enjoin the closing of a public facility by public officials whose duty is to uphold the constitution in order to protect ~~the~~ a constitutional right.

~~(an aside----the effect part is not completely written in order that all the arguments are here???~~ THE FOLLOWING Arguments are tentatively headed :

CLOSING OF RECREATIONAL FACILITIES UNCONSTITUTIONAL JUST AS CLOSING OF SCHOOL CASE IS UNCONSTITUTIONAL

To look at ______________,,-________________, and closing with less than a piercing scepticism is to forget the lesson of a school desegregation decision.In 1955 the Constitution and the law of the land became clear separation was inherently unequal (cite Brown case) The counties and municipalities sought every possible means to perpetuate sep. but unequal They closed schools (see for ex. Prince Edward County case) . States provided$$$$ aid to segregated private schools in the form of grant-in-aid and in the form of money to municipalities to pay for the support of priv. schools. These statutes were on the face appropriated to all-white schools only and to all-white children and Negro children were deprived of all education. Fed. officails declared all such statutes and all such techniques of closing unconstitutional and invalid. See for ex. Busch v. New Orleans School Dist. ____________County Sch. Bd. of Educ. (exact names and cites will follow) Public officials of such states and counties wereleft by force of the const. and judicial decision with only one alternative, the right one,desegregation And it is the same in the case of recreational faicliites . Again counties and municipalities have to be taught that closing, leasing and selling to perpetuate disc. is unconstitutional and enjoinable.

(We gathered some social science materials on the essetiality of municipal rec. facilities and we felt that the best thing to do would by to give you direct quotes from them and let you use your disgression . J-we can always submit a suplemental brief. C--we tried to work it into the argument, but it seemed to overlap and it would take a lot of work . J-instead of quotes, send them spec. del. , we'll get them tomorrow.)

~~The discriminatory effects must be enjoined~~

THE DISCRIMINATORY EFFECTS MUST BE ENJOINED

It is because of these truly discriminatory effects that the plaintiffs are in this court. The harmful and illegal effects of the closing of these pools are not decreased by the fact that whites too may not use the public swimming pools, whites like Negroes need not stop and calculate before using public facilities whether the harm done if the facility were closed altogether would be worse than the harm done by utilizing the facilities on a seperate but unequal basis. Whites unlike Negroes have according to the proof of the past convenient access to all alternative v facilities. More importantly a wrong dooer may never excuse himself by inflicting a greater or even a lesser harm upon himself it would be a novel theory for example in contract law that excused breach of contract was ever the defendant could proove that he too was injured by the loss of the close benefit of the bargin". As the Supreme court c said in Shelly ~~k~~ v Cramer

> "...the right created by the first section of the Fourteenth Amemdment are, by its terms, guaranteed to the individual the ritht established are personal rights It is, therefore, no answer to these petitioners to say that the court may also be ~~[illegible]~~ induced to deny white persons right of ownership and occupancy on grounds of race and color. Equal protection of the laws is not achieved through indiscriminate ~~[illegible]~~ imposition of equality. Similarly it is ~~mm~~ no answer to plaintiff________ in the case at bar to say that whites are equally deprived of Tallahassee w swimming facilities such a position can only result from the hasty view of the bad effects of this closing

which was to fundimentally deny ______________________________

(much noise lost a lot here) lf.

THE IMPROTANT FUNCTION OF THE COUTR IS INFORCING THIS RIGHT OR MAKING IT REAL

Through out the period that the three pools were open on an unconstituiional or un rectified seperate basis plaintiffs ~~are~~ were being denied of a constitutionally guaranteed right however operating with in the contexts of our legal and judicial system that right needed to be asserted and immenent injury needed to occure before it could actually be "q guaranteed" ; the courts are the honored institution for obtaining and insuring that guarantee after voluntary efforts to 1 hange discriminatory and unlawful policy of the state or municipality failed. The Civil Rights act of 1964 Title III emplhasizes this profit by empowering the attorney General to bring an action pursuant to the receipt of a complaint concerning injurious discrimination in public facilities. Ironically Tall. officials' closed the pools two days after the passage of that statute. The

The court is the strenght behind the right guaranteed in the fourteenth amendment. It creates in reality asmuch as the const. creates it in idea. As long as there are government and men using the force of govt. auth. men who believe they can live under the privelges of the constitution and out of its ___P_________ and obligations. If the force were to permit Tall. official s to close these pools it would help for sure the effectiveness of their discriminatory efforts. NOt only would the plaintiffs continue to be deprived of their const. right but they might have to think carefully about asserting the existence of that right. That is, about attempting to use public facilities to which by law they have lawful access, because of the legitimate fearthat the private assertion of their lawful right would lead to a purposeful closing and total loss of the facility and probably to others like it. The only way to prevent this discriminatory injurious effect is to seek as the plaintiffs presently are, relief in the court and a strong declaration that closing of public facility solely for discriminatory purposes is an unconstitutional device denying them the equal protection of the laws. As stated in Shelley, "the guarantee of the const. is clear with respect to such deprivation of rights . The function of the judiciary is to guard and insure those rights when other means fail and injury creating a judiciable issue occurs. The court may have to perform this function by refusing to enforce a private discriminatory agreement as in Shelley v. Cramer . Thus preventing a n unconstitutional effect even thoug the parties at the voluntary stage have a right to so agree" Or if they have to enjoin the closing of the swimming pools under other circumstances a "possible"right" of the municipality, in order to prevent the other unconstitutional effects of ~~the [illegible]~~. of leaving plaintiffs with an abstract unenforcable right against discrimination resulting in actual injury and of leaving the def. freee to continue to discriminate, without being confronted with further attempts by persons such as plaintiffs.to exercise their right. A right that is abstract and unenforcable is no right at all. The Fourteenth Amen. so openly defied by the def. in the case at bar becomes meaningless.

(I have a paragraph here which I think is a good approach distinguishing t Hopkins case and I'd like to give it to you ---you can use it if you wan to)

While the court in Tonkins permitted the sale of a segregated public golf course to private persons , it required a bona fide sale and kept the case before the court for supervision and argument concerning the genuineness of the sale. That the court did not enjoin the sale is not relevant here. That the court permitted because and only because of its finding that it was bona fide , that is, non-discriminatory and open to the highest bidder with no indication that only a private party that would discrimnate could bid and win is relevant. End of her parag.

J--what do you consider the weightiest argument in the brief?

C--_____________Mills argument because _________case before the Sup. Ct. says if you close something for disc. purposes and disc. effect is going to result and we're going to re-order you to re-open. You must get the Darlington case clear: the court itself did not order a re-opening, it retunned it to the NLRB for a finding that the Darlington plant was part of the larger enterprise because if it was only a single plant , a single employer has an absolute right, even if he has discrimniatory purpose , to temminate his enterprize. But the importance of the Dar. case is that if ther is any notion that there will be a benefit to the employer, in terms of adhieving the affect of not getting union organisation in his plant becaus e this guy Milliken hated unions, then they will enjoin such a closing for such a purpose with such an affect. And the enterprixe does not have to be integratedor one organization, the emphasis is on one employer and the way I look at it our Tall. officails are employers and they're running ppblic facilities of all sorts and the swimming pools are just part of that big enterprize.

J--what about the Prince Edward County case?

C--it's a very difficult case to use 1) the holding was

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF FLORIDA,

TALLAHASSEE DIVISION.

ROCHELLE STEELE, DARRYL STEELS, BOTH MINORS, by Reverned C. K. STEELE, their father and next friend; and SADIE ESTELLE GORDON, Individually and as representatives of a class,

Plaintiffs,

vs. NO. 1073 Civil

GEORGE B. TAFT, Mayor and Commissioner of the City of Tallahassee, Florida; ARVAH HOPKINS, City Manager, HUGH WILLIAMS, JOE CORDELL, DAVID ATKINSON, and WILLIAM H. CATES, COMMISSIONERS of the CITY OF TALLAHASSEE, FLORIDA: FRANK STOUTAMIRE, Chief of Police of the City of Tallahassee; RECREATION BOARD; JAMES HADAWAY, RECREATION DIRECTOR, Tallahassee; et al.,

Defendants.

Tallahassee, Florida

July 16, 1965

BEFORE:

HONORABLE G. HARROLD CARSWELL,

UNITED STATES DISTRICT JUDGE

APPEARANCES CONTINUED:

HONORABLE JACK BRIAN
540½ West Brevard Street
Tallahassee, Florida

Attorney for Plaintiffs

HONORABLE ROY T. RHODES
102½ South Monroe Street
Tallahassee, Florida

HONORABLE RIVERS BUFORD, JR.,
404 Midyette Moor Building
Tallahassee, Florida,

Attorneys for the defendants

THE COURT:

Good morning. Be seated, please.

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

THE COURT:

This is a hearing on really two matters, actually, or more, with respect to the case of Steele vs. Taft, so-forth, on one hand a Motion to Dismiss filed in behalf of the defendants and on the other a Motion for Temporary Restraining Order and Preliminary Injunction filed on behalf of the plaintiffs. The Motion to Dismiss has been pending for awhile longer, matter of fact some thirty days longer, and by the, as I understand it, agreement of everyone concerned these matters can be brought up at this time without any further ado.

MR. RHODES:

May it please the Court, we would like the record to show the complaint in this cause was filed May 21st, 1965. Subsequently most of the defendants named were served during the month of May and within the ~~required~~ prescribed legal time. Motion addressed to that complaint seeking its dismissal for failure to state a cause of action in several instances and other instances dealing with insufficiency of process or service of process was filed. That subsequent to that in point of time on Thursday, July 15th, yesterday, this week, I received a letter from John D. Due, Jr., attorney of record for the plaintiffs in this cause in which I was apprised "I am enclosing Motion for Temporary Restraining Order and Preliminary Injunction in this case, which was filed with Judge Carswell on Wednesday, July 14th. He has scheduled argument on the motions for Friday, July 16th, 1965 at 11:00 AM". In order to direct my reflect the expeditious nature by which the instant filed motion for Temporary Restraining Order and Temporary Injunction is now being scheduled by the Court today, Friday.

THE COURT:

All right, sir. Let the record so show.

The basic thing here to start with is, I believe, to take up the matter of the Motions to Dismiss. They have a prior standing in the point of filing and they, also, as in all cases, it is customary for those things to be gone into. I will be glad to hear you on that.

MR. RHODES:

May it please the Court, in that neither of the three attorneys whose names appear on the complaint are the attorneys' names who appear on this motion filed in that appear to be in Court and for purposes of the record I wonder if the gentlemen present for the opposing side would identify himself so we may know.

THE COURT:

All right, sir.

MR. BRIAN:

Unfortunately I have never had the privilege of appearing before Your Honor before, I am Jack Brian. I have given my name to the Clerk. I am a member of the Bar from the State of

Pennsylvania, admitted to practice before the Supreme Court of Pennsylvania and the District Courts, Federal District Courts in the Eastern District of Pennsylvania; the Federal Circuit Court of Appeals, Third Circuit, and the United States Supreme Court.

I am happy that Your Honor has extended to me the courtesy to argue this matter on behalf of the plaintiffs as Your Honor knows it is unfortunate for Mr. Due to do as he is unable to be present today, as Your Honor knows.

THE COURT:

Well, I can only say --

MR. BRIAN:

Your Honor,

THE COURT:

-- I want to say something in response to that, Mr. Brian. The inquiry was made of the Court -- I want the record to be clear about this -- by Mr. Due as to the attitude of the Court with respect to your arguing a motion here today. I advised Mr. Due, as is the course in any case, that as an associate counsel for the purpose of an appearance with respect to one case, upon the suggestion of counsel duly admitted to practice before this Court, that that would be done. I must say, however, that I am surprised that he is not here and it was nothing ever intended by the Court to waive the rules of the Court in this regard. I mean this is perfectly standard normal procedure, there is nothing unusual about it, counsel from other states or from anywhere have come into this court and done so for longer than I can remember I am sure upon the motion of associate counsel. However, it has always been inherent within the field of things that associate counsel would be present and the rules are very explicit about the matter. I don't think there is any confusion about it. I must say that I am very much surprised that he isn't here and he certainly should hae been. There is nothing inherent in anything whatsoever in any discussion to waive that.

I do receive you here in accordance with that rule but he certainly should be here. Why isn't he here?

MR. BRIAN:

Sir, I am not familiar with why, I assume he is tied up on other matters.

THE COURT:

This hearing was scheduled as you know, you and Mr. Due came to see me.

MR. BRIAN:

Yes sir.

THE COURT:

And asked for a hearing. I said I could give you one that afternoon within a matter of hours. This was not agreeable with opposing counsel. I told you I could hear you at any time from that moment until this afternoon if you and Mr. Rhodes were in agreement. The Court was available. I suggested Thursday if it would be more appropriate than today, you will recall I am sure.

MR. BRIAN:

Yes sir.

THE COURT:

And at your specific request you asked for it on Friday, it was more desirable, because Mr. Due told me he had to be in Marianna on Thursday. So the matter was set at this hour at your specific request. I don't see any reason to make any further ado about it but I do think the rules of the court are going to have to be observed in some more particular, we just can't waive every rule that comes along on these matters. I note the objection but we are going to proceed to go ahead.

MR. RHODES:

May it please the Court, at this point to what am I to address myself on?

THE COURT:

The Motion to Dismiss. You have a motion to dismiss. I am merely calling them in chronological order and that is the first one on top of the file.

MR. RHODES:

Initially, then I would like to address myself to the Motion of the defendant, George B. Taft, Mayor of the City of Tallahassee, to dismiss this complaint as to him, as a defendant, for individual process of that defendant, for insufficiency of process as to that defendant and the failure of the complaint to state a cause of action for the relief to be granted.

Addressing myself to the first two points in the style of the cause and in the summons which was attached to the cause which was served upon the person who occupies the position of Mayor of the City of Tallahassee, as identified, the man George B. Taft.

THE COURT:

Mr. Rhodes, may I make a suggestion?

MR. RHODES:

Yes sir.

THE COURT:

Without your waiving any claims along those lines on those motions, would it not be better to move

Initially, then I would like to address myself to the Motion of the defendant, George B. Taft, Mayor of the City of Tallahassee, to dismiss this complaint as to him, as a defendant, for individual process of that defendant, for insufficiency of process as to that defendant and the failure of the complaint to state a cause of action for the relief to be granted.

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THE COURT:

Mr. Rhodes, may I make a suggestion?

MR. RHODES:

Yes sir.

THE COURT:

Without your waiving any claims along those lines on those motions, would it not be better to move into the failure to state a cause of action, as such, because if I understand your motion correctly, if you are right about that part of it, the other is moot, isn't it?

MR. RHODES:

Yes sir.

THE COURT:

Without your waiving any of those rights at all, I merely ask you to take that matter up first.

MR. RHODES:

Addressing myself to the primary failure to state a cause of action against the defendant, George F. Taft, shall I address myself, Your Honor, to the Motion of the defendant electing to file a motion stating that?

THE COURT:

If I read your Motions correctlynthey all state the same basic thing.

MR. RHODES:

Yes sir. The complaint, if it please the Court, concerns itself with an effort on behalf of a class to enjoin the collective defendants -- and I will read you paragraph IV --

> "This is a proceeding for an injunction restraining defendants from continuing or maintaining, any policy, practice, custom, custom and usage of withholding, denying, attempting to deprive, otherwise interfering, with the rights of the plaintiffs and others similarly situated, of equal utilization of a public facility which is owned, operated, or managed by the City of Tallahassee, State of Florida, to-wit: recreational facilities comprising three swimming pools; without discrimination or segregation on the grounds of race or color."

Then the complaint goes on to state that the swimming pools involved are three pools located in the City of Tallahassee; and that these pools were closed in July of 1964. This is more than a year ago. And goes on to say that because these pools remain closed, I assume, that these plaintiffs are denied of equal protection of the law and being discriminated against, in violation of the Fourteenth Amendment, Section 1342 of Title 28, and Title 18, -- Section 1983 of Title 42. Our position, purely and simply, Your Honor, is that we acknowledge and recognize what the law says. We, in the City of Tallahassee, are not operating municipal pools on a segregated basis. We have no municipal pools that are in operation. I think the base of this complaint reflects that there are no municipal pools in operation in any manner, segregated or otherwise. Therefore, factually and as a matter of law, there can be no basis for the relief sought in this complaint, to affirmatively require the City of Tallahassee to open a facility which in its discretion has been closed. To require that they be restrained from selling the facilities which under the law of this land we are at liberty to sell; and to enjoin a leasing or a use that would result in discrimination, when we recognize that the law of the land would prohibit such a use.

THE COURT:

Do I understand you correctly on your last statement that the City at this hearing, through you, as its attorney, represents to this Court that they are fully in accord there could not be any kind of lease arrangement which would result in actual segregation, discrimination, under the Fourteenth Amendment which could be legal? Is that what you just said?

MR. RHODES:

We recognize under the Fourteenth Amendment a municipality may not operate a pool under its governmental authority at this time.

THE COURT:

Either in its own capacity or through a lessee?

MR. RHODES:

It may be possible, Your Honor, on the parallel cases in this Appellate Circuit originating in New Orleans and Montgomery, I believe, where the proposition was recognized that while as a general rule a municipality would be, or a governmental agency, would be prohibited from a long term lease of a facility to a private enterprise which was operated on a segregated basis. While that is true, the Fifth Circuit Court of Appeals recognizes that specific short term leases of a facility that it was involved with at that time, which was an auditorium, could be leased, the language of the case, "for a short term", maybe overnight, maybe a day or two thing, to specific organizations whose membership --

THE COURT:

Was in fact one race or the other?

MR. RHODES:

Correct. Your Honor, I think our Fifth Circuit in those cases recognizes in specific isolated instances this could be done and it would not be a violation of the Fourteenth Amendment and certainly I see the wisdom by the Fifth Circuit, otherwise we acknowledge the principle we cannot operate it, the City of Tallahassee segregated municipal swimming pools.

THE COURT:

Mr. Rhodes, did you make any effort to research the law as to whether or not there is any on a segregated basis. While that is true, the Fifth Circuit Court of Appeals recognizes that specific short term leases of a facility that it was involved with/at that time, which was an auditorium, could be leased, the language of the case, "for a short term", maybe overnight, maybe a day or two thing, to specific organizations whose membership --

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THE COURT:

Mr. Rhodes, did you make any effort to research the law as to whether or not there is any case in the country, in any Circuit, which has held that a municipality can be compelled to operate swimming pools?

MR. RHODES:

Quite the contrary, Your Honor, I have searched the law and came to the conclusion that the Courts have repeatedly held that a governmental agency, such as a municipality, cannot be required to operate a discretionary facility. There are many cases I can specifically call to the Court's attention if you desire that involve specific areas of recreation which municipalities have elected to close, in fact closed, and removed from public use in its municipal discretion, and the Court recognizes the right of the municipalities and have said that this did not involve a violation of any right of the Fourteenth Amendment of anybody, and that they would not be required or compelled to open them or to provide a discretionary recreational facility. For instance, may it please the Court, in this situation now before the Court, here in July, of 1965, the City of

Tallahassee is operating within its fiscal budget, commencing February 1st, March 1st of this year and goes through February 1, 1966, the City Commission of the City has appropriated no funds for the operation and maintenance of a municipal swimming pool in the City of Tallahassee. There were no funds provided in the budget under which the City of Tallahassee is operating at this time. The pools have not been opened during this fiscal year and they are closed now, and there are no funds in the appropriation of the budget for the fiscal year providing for their opening and their operation. The entire proposition before the Court, on its face, is a moot one, and we think should be dismissed. There is no showing of the existence at the present time in the allegations of this complaint of the deprivation of anyone of their Constitutional Rights to which they are entitled. To do otherwise would involve, I feel, judicial direction, or exercise by municipalities that would involve if any changes are sought that would involve a direction of appropriation, then the source from which that appropriation comes, merely which the appropriation would be budgeted and be extended. It might well, under the same theory, go far beyond the purview and the scope of the operation of swimming pools under a judicial find, and have a municipality directed to go ahead and then not do anything that would be in violation of the Constitution or illegal. For instance, it may be directed under the same procedure not to perform any illegal searches and seizures. I think the Court can see where this would lead us. Without question, I think, that a governmental entity will recognize and respect and obey the law of the land. The City of Tallahassee will.

THE COURT:

Thank you. Mr. Brian I don't want to take your argument away from you and I will not, but I do want to ask you one question at the outset, however. Can you tell me at the outset here upon what authority that this Court could require a municipality to operate swimming pools?

MR. BRIAN:

Sir, the short answer to that is the

case of Griffin vs. Board of Education of Prince Edward County, --

THE COURT:

Is that the Virginia school case?

MR. BRIAN:

--decided by the United States Supreme Court, opinioned by Justice Black, speaking for the entire Court without dissent, several years ago.

I would like, if Your Honor please, to develop the full range of my argument and I will get to that case and discuss it extensively, if the Court will let me.

THE COURT:

Well, I want to ask you one other question. Are you familiar with the case of the City of Jacksonville, decided by Judge Simpson some years ago?

MR. BRIAN:

Is that the case of Hampton vs. City of Jacksonville?

THE COURT:

I am not sure what the style of the case is, but it involves that identical matter.

MR. BRIAN:

I am familiar with that case and I am familiar with others that have reached the same result, particularly the case of Tonkins vs. The City of Greensborough, a recent case, which I think even more strongly supports the position I take. I would like to discuss these cases as well in the context of my argument, because I think, whether Your Honor has had a chance to examine these cases, there is error, and which you will conclude that they, it is quite clear distinguished and remote from our situation and many of the facts are governed by a more recent case, Griffin vs. Board of Education.

THE COURT:

All right, sir. You may proceed.

MR. BRIAN:

I would like to say in prefacing my remarks here we are in the process of writing our brief. As a matter of fact, we had hoped to have it typed and present it to Your Honor prior to the time of argument. I would like leave of the Court to file it later.

THE COURT:

You may do so. What time?

MR. BRIAN:

I believe we will have it ready to be filed by 2:00 o'clock this afternoon.

THE COURT:

All right.

MR. BRIAN:

I think it will be well to begin my argument by referring briefly to the sequence of events under which this case arose. Our complaint setsforth, briefly, that following the enactment of the Civil Rights Act of 1964, signed by the President of the United States on July 2nd, 1964, that two days thereafter, on July 4th, 1964, that several negro youngsters appeared at the Levy Park swimming pool in the City of Tallahassee and attempted to gain admission and use the facilities of the pool. That same afternoon that pool and the other two pools operated by the

City of Tallahassee were summarily closed by order of the City Manager of the City of Tallahassee. And these pools have remained closed since that date.

There has been to my knowledge no action by the Board of Commissioners or other City Body of the City of Tallahassee. There has been no discussion, no action of any board whatsoever taken either confirming and verifying or legalizing the action the City Manager and his action taken on his own initiative is the situation that we confront today and out of which this suit arose.

We are discussing initially here, if the Court please, a Motion to Dismiss, and I am certain I need not labor the point for Your Honor for such a motion holding material allegations of fact in our complaint must for the purpose of this argument be taken as true. Now, this is significant in the light of Paragraph VII of our complaint. I don't intend to read it. The complaint is before Your Honor. In essence Paragraph VII alleges that the City Manager and other unnamed defendants, officials, has a duty to report to others which amounted to a deliberate and intentional closing of those pools in violation and with the specific purpose and intent of denying to the plaintiffs and those similarly situated their rights under the Fourteenth Amendment of the United States Constitution and deliberately and wilfully and intentionally did so.

THE COURT:

Is it your argument that there is a Constitutional right inherent to each citizen to swim in a pool?

MR. BRIAN:

Absolutely not.

THE COURT:

Then what is your argument?

MR. BRIAN:

I would like to develop it if I may.

THE COURT:

You may.

MR. BRIAN:

I refer to Paragraph VII of the complaint. It is significant, in my opinion, that the motive for the closing of the pools is of legal consequence.

MR. RHODES:

May it please the Court, I don't want to interrupt, but Paragraph VII, if he is referring to Paragraph VII is not closing of the pools.

MR. BRIAN:

I may have the wrong number. It is Paragraph XVII -- thank you very much Mr. Rhodes. I said, Your Honor, that the motive of defendants is significant and this motive as setforth in Paragraph XVII of our complaint must be taken to be true. Now, why is the motive of the defendants signigicant? There are a line of cases which I may refer to -- Lawrence vs. Hancock, which was a case involving a swimming pool; Tate vs. Department of Conservation and Development, involving a State Department; Simpkins vs. City of Greensborough, involving a golf course; the different facilities involved principles of law enunciated by identity. And in these cases a common threat in which the Court has specifically stated that a municipality may not enter into some action, transaction, where the deliberate intentional purpose of that action is to deny the agreed party their right under the Fourteenth Amendment, which in effect would result in discriminatory treatment. So, I say to your Honor, that the motive is important and needs taken without exception on the part of a municipality which requires action and in these cases lease transferring the facility to private organizations had to be stricken.

THE COURT:

I think opposing counsel agrees with you on that basis as a principle of law.

MR. BRIAN:

Now, as a matter of fact, I would like at this point to refer to the last case which is even stronger. These line of cases in which motive is not actually discussed at any length, appears a fact to be irrelevant. These cases I also cited in my brief -- they are the City of Montgomery, and the case to which the Court referred earlier, Hamptonn v. City of Jacksonville; and in these cases it is quite true, Mr. Rhodes in his argument, Your Honor, that the Court stated quite clearly that no one had a right, a Constitutional right to have a swimming pool, a discriminatory swimming pool, and that if the City in its wisdom was determined to follow this that no discriminatory treatment could be followed because the closing of the facility acted fully upon both parties; and, therefore, there was no discrimination. As a matter of fact, the longest case, and I freely concede so, is Tonkins vs. The City of Greensborough. I would like to quote from that case.

THE COURT:

Let me ask you this, Mr. Brian --

MR. BRIAN:

Yes sir.

THE COURT:

-- have any of these cases reached the Fifth Circuit?

MR. BRIAN:

Yes sir. *Hampton vs. City of Jacksonville,* I believe, has reached the Fifth Circuit.

THE COURT:

I believe Judge Simpson rendered a decision at the District Court level and he was affirmed by the Fifth Circuit, is that correct?

MR. BRIAN:

I think that was the *Simkins* case.

THE COURT:

Well, Judge Simpson is in Jacksonville.

MR. BRIAN:

The Court in Tonkins, has to say: "If the swimming pools are closed at all (I am quoting from page 556 of 162 Fed. Supp) -- If the swimming pools are closed at all or disposed of at a bona fide public sale, there can be no illegal treatment, and, therefore, no racial discrinination. No citizen of Greensborough will have access to municipal swimming pools." --

THE COURT:

Greensborough, what?state?

MR. BRIAN:

Tonkins vs. the City of Greensborough, Greensborough, North Carolina. A North Carolina case.

THE COURT:

That would be the Fourth Circuit, another Circuit case.

MR. BRIAN:

--unless persons under the same circumstances and conditions are treated differently, there c can be no discrimination. No person has any Constitutional right to swim in public pools, citizens do have the right, however, if a public swimming pool is provided not to be barred therefrom because of race or color. If the swimming pools are closed or sold the right to all if closed or sold would not discriminate against anyone."

I take it that this in essence is what Mr. Rhodes is arguing what his position is.

THE COURT:

Let me ask you this -- are you reading from the Fourth Circuit's opinion or a District Court opinion?

MR. BRIAN:

In this case, Your Honor, a District Court.

THE COURT:

Who is the Judge?

MR. BRIAN:

Opinion by Stanley, District Judge. I don't believe this case has been appealed.

THE COURT:

What is the date on that, Mr. Brian?

MR. BRIAN:

The date on this case is May 23, 1958.

THE COURT:

While you have got that, sir, give me the citation?

MR. BRIAN:

Tonkins, TONKINS vs. The City of Greensborough, 162 Fed. Supplement, page 549. the quotation can be found at 556 and 557.

THE COURT:

Thank you. Do you have handy the other two cases that you mentioned?

MR. BRIAN:

I don't have the cases but at 2:00 o'clock you will have the complete citations.

THE COURT:

I thought you had them in your papers.

MR. BRIAN:

No sir, I do not. I think that I have stated the position against them. The strongest term that I know how. And I think that Your Honor will get the point that these cases we have discussed, to which I have referred, are no longer the law of the land. I say that, Griffin vs. Board of Education of Prince Edward County, decided by the United States Supreme Court and, in my opinion, which I submit to Your Honor, has overruled these other cases in the various Circuits and Districts, and which today represent the law of the land by all the Courts in the United States.

I would like to disuuss at some length the history of this litigation. ~~I think that I~~

should in view of the circumstances here.. In this case which arose in the State of Virginia in the County of Prince Edward after the decision in the land-mark decision in 1954 in Brown vs. Board of Education there was as had been determined in the opinion by Justice Black a massive resistance on the part of the State and various firms to deny the effect and consequence of the board of school segregation there. There were areas of litigation arising out of various bills enacted by the Virginia Legislature which purported to question the validity of the act, the right of the Brown case. All of them ultimately were returned. Ultimately the State of Virginia adopted a so-called free place system with respect to the public schools. In essence, what it amounted to was that instead of requiring compulsory attendance, relieving all counties of the duty of providing public instruction to the children of the State of Virginia, and incidentally footnote to that, the Court referred to the opinion by the Supreme Court of Virginia specifically held the Constitution of Virginia no longer required, did not require I should say, compulsory school attendance. Did not require any taxation for the provision of taxes for public money for the payment of expenses incurred by the Department of Education.

The so-called free place system in essence was that each county was permitted to run its own school system and if the school children preferred to go to a private school the county would pay a tuition, or grant, for that child in order to pay a portion for its education. Prince Edward County at a later time determined to supplement that grant by a county grant. There are a series of litigation which I think are not particularly helpful here in which Mr. Patton assisted in many aspects. Ultimately, a suit goes into the question of the Constitutionality of this system in Prince Edward County and reached the Supreme Court under the heading of the Griffin case and the decision of the Supreme Court in that case was that, it says first -- "that the closing of the public facilities (in this instance, the public schools), was discriminatory and a violation of the plaintiffs' rights under the Fourteenth Amendment of the United States Constitution. In violation of the equal protection laws. And that, as such, the Court would order through the District Court the reopening of those schools. And not only reorder the reopening of the schools, because the closing was in violation of rights of plaintiffs, but would order the public facilities in this county taxed to provide money for the expenses incurred in running and the operation of the schools."

THE COURT:

Is the thrust of your argument here then that the requirements of public education, which in effect broadly stands the Court, is to be correlated with the operation of swimming pools?

MR. BRIAN:

I respectully submit, Your Honor, it is.

THE COURT:

The undertaking of any municipality, any-

(in this instance, the public schools), was discriminatory and a violation of the plaintiffs' rights under the Fourteenth Amendment of the United States Constitution. In violation of the equal protection laws. And that, as such, the Court would order through the District Court the reopening of those schools. And not only reorder the reopening of the schools, because the closing was in violation of rights of plaintiffs, but would order the public facilities in this county taxed to provide money for the expenses incurred in running and the operation of the schools."

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MR. BRIAN:

I respectully submit, Your Honor, it is.

THE COURT:

The undertaking of any municipality, anywhere, if they ever undertake it, then there is a Constitutional right invested in the citizens then to keep it going?

MR. BRIAN:

Certainly I would phrase it, I would say that the obligation is upon the municipality to run it equal for all citizens so that there is no unequal treatment for any citizen affected by the operation.

THE COURT:

Well, there are many things to follow this logically for a moment, there are many things that municipalities don't do now. Are people being advised it is their Constitutional right because they don't do those things?

MR. BRIAN:

No sir. I am dealing with the facts as they are, a hypothetical situation. In this case, the City of Tallahassee has provided money and has built and operated swimming pools for the benefit of all the citizens of Tallahassee and has taken steps -- and here again, I remind Your Honor, that this motion we must assume is true that they deliberately and intentionally closed these pools for the specific purpose of denying certain negro children the right to use these pools on a discriminatory basis. I would say that having built these pools and operated them they cannot close them for that unconstitutional purpose.

THE COURT:

Mr. Brian, granting you for a moment the apparent absurdity on the face of the thing, of the City having swimming pools closed down, no one using them, just assuming for a moment that this Court no less than anyone else could be observant of the ultimate fact that the apparent absurdity of such a situation, granting all that, is it your contention, for whatever reason it may be, that this situation has got to be corrected about Constitutional enforcements of edicts of the court? This is disturbing to me, frankly, because I don't believe the Courts, here or anywhere else, are going to be able to solve all the absurdities that life encompasses with it. This is disturbing to me because the very' fact the Constitution itself, while elastic, it has its tearing points and if we are to indeed invoke into the stream of the judicial grants all of the aspects of righting a wrong and issuing every direction to correct an absurd or improper condition, then I think we might well abrogate all responsibility for any other branch of the government. We would have no use for Congress, Legislators, or Mayors, or anyone else, just come over to the courthouse and get an order because this thing is absurd.

MR. BRIAN:

I appreciate it, Your Honor, your comments are well made. However, I think even in the exercise of appropriate provisions is the same, in view of the court granting another, that there are situations that I could mention, one is the only way in which the rights complained of is through the courts. We have no other way of seeking relief except through this court and then the higher court to test that right.

THE COURT:

I think the power of the electorate is a very strong way to express its views and I think gets results.

MR. BRIAN:

Well sir, may I -- I don't think I have to remind Your Honor, that again giving you specifically the city which we are here dealing with, higher electorate is not one that can be brought to bear on the representatives of the people in such a way as to protect the one segregated population which has had its right denied.

THE COURT:

Well, it is admitted that both of us are unsupplied with the facts on these things --

MR. BRIAN:

These are legal arguments.

THE COURT:

I think that this is somewhat a philosophical point of view. I share, it is long believed that the electorate can be heard and is heard. I think that those who are elected to public office do respond and respond promptly to the wishes of the people that express it publicly. I think this is inherent on the system.

MR. BRIAN:

I want to go on just a bit with the Griffin case to point up certain analogies in the present situation what I am inquiring from Your Honor. I think first of all the argument can be made, if it has not been made today, the Griffin case is different from our case because there was a duty upon a county or some other governmental body to provide free public education and there was no duty whatsoever upon any governmental body, certainly not upon the City of Tallahassee, to provide swimming pools for the children of the City of Tallahassee, I say that is not a point of issue because it is quite clear in reading of the Griffin case there was no duty on the county to provide public instruction and the Supreme Court of Virginia --

THE COURT:

Well, they said it was the duty, however, of the State if they went into the education business. I am familiar with the Prince Edward County case. As I understand the basic holding there was if the State of Virginia was going to involve itself with the problems of public education at all, that it could not do so by the manner of devised there employed in Prince Edward County and that is simply about what the case stands for -- they say, you are either in the education business on a completely non-discriminatory basis with the full guarantee of the Constitutional Amendments or you are not, and they didn't meet that particular test. In other words, they got into the education business and they were in it while they were operating these things one way in Prince Edward while they were operating them in another manner in Richmond and other places. Now, here, we haven't got that situation. We have got three pools and they are all closed.

MR. BRIAN:

Well, it is analogous because of the fact Prince Edward did run public schools, that is the whole point of the case. Let me read a portion of the opinion, I quote from the opinion at page 265:

> "But the record in the present case could not be clear that Prince Edward schools were closed and private schools operated in their place in state and county, for one reason and one reason only, to insure through measures taken by the county and state that white and colored children in Prince Edward County would not, under any circumstances, go to the same schools."

We say there is no real honest distinction between the situation here and the situation in Prince Edward County in the Griffin case, but I submit that going beyond the Griffin case there are additional reasons why unequal treatment, despite a line of cases preceding the Griffin case, say there were no discrimination. There is good reason one might conclude that there is unequal treatment in the opening and closing of schools.

If the Court allows this closing to stand it seems to me realistic and failure to assume that the negro population of the City of Tallahassee, or any citizen in this situation if it occurs, would be precluded from exercising their right to integrate public facilities. They would then be under a threat of the immediate closing wherever they intended to exercise their right of a facility that was open. They would be deprived of any facility whatsoever which were closed. These arguments are, in my opinion, Your Honor, sufficient answer to the Tonkins case.

I will just briefly refer to the cases upon which Tonkins relies, Clark v. Flory, briefly a case in which a suit was brought to desegregate a beach resort, I believe in the State of South Carolina. While the suit was pending the legislature enacted a law which closed completely the beach resort and specified that it was not to be opened until further enactment by the legislature. Now, when the case reached the Court, the Court said two things -- first of all, that prior judgment, and more important that the case was moot. I think Mr. Rhodes made that argument in his argument. But in the analysis of this case again will show Your Honor that the relief requested in Clark v. Flory is not the same relief we request here, the relief requested in Clark v. Flory was that desegregated use be ordered by the Court. Now, we are asking for a different type of relief. We are not asking for desegregated use, we are asking for the reopening, which I submit is different from the relief sought in Clark v. Flory. I just want at this point to discuss briefly our situation with respect to our Motion for an Injunction -- I take it that we have completed arguments on the Motion to Dismiss. Our position is that we want to conclude that. We have a valid cause of action stated, there is a valid cause of action stated, then I think it follows necessarily immediate injunctive relief would be appropriate and necessary here. Swimming pools are made to swim in and it is now July 16th, half the summer is gone, irreparable harm has been suffered by these plaintiffs. I don't think I have to elaborate on the basis. I just want to say one final thing, I sincerely feel there is no case on one point, I mean there is no case which says a Federal District Court has the right to rule on a swimming pool.

THE COURT:

On the contrary, there are cases which do in the Fifth Circuit, which has jurisdiction over this Court.

MR. BRIAN:

I freely concede, Judge, that there are such cases. I think I have carefully delineated the history of the cases.

THE COURT:

I appreciate your candidness Mr. Brian.

MR. BRIAN:

Hosever, I do say our case is based squarely on the underlying philosophy of the Griffin case, which says --

THE COURT:

It is unconstitutional -- the Act is unconstitutional. I got your point.

MR. BRIAN:

And further, that the District Court has a right to order reopening and a further right to insist that the local taxing body appropriate money to support and maintain it, the facility. Now, I say this case like the Griffin case -- I believe that the

Griffin case represents a further extension of the Fourteenth Amendment and it is sound law and binding upon this Court. I would hope that this Court would have the power of enunciating the principles to establish in a public facility, such as a swimming pool -- the Court does have the power to reopen these pools and to deny and strike down the injustice, unequal treatment, afforded all citizens in the City of Tallahassee.

THE COURT:

Mr. Brian, I thank you, and I want to say this to that last you said. This Court has no timidity about enforcing Constitutional Rights, indeed it had occasion, in the last month I believe, to first construe the Civil Rights Act with respect to another field of activity, the first in the country, and upheld the constitutionality of the Civil Rights Act with respect to certain related activities; that is, with respect to barbering in hotels and motels, so there is no timidity on the part of this Court by carrying out what it sees to be the law. Nor is there any timidity in the consequences of denying relief where I feel the law is to the contrary.

MR. BRIAN:

May I express my pleasure and gratitude to Your Honor in your consideration of an out-of-state lawyer and it has indeed been a pleasure to be before Your Honor in your court.

THE COURT:

Thank you.

MR. RHODES:

May it please the Court, we have several brief points which I would like to make, in conclusion.

Initially, addressing myself to the Griffin case, decision, I think this is completely inapplicable, and its inapplicability is clearly indicated in two ways. One being in the field of education itself; and the second I feel more significant and important, referred to by opposing counsel, reading from the decision itself, in which the United States Supreme Court acknowledged that it was dealing with a situation in which State and County assistance was being given to private schools. We are confronted with the situation here in which the City of Tallahassee lease, a long term lease, or sold to private operation, would be operating on the same segregated basis and continue to support such a facility with public funds. There is no question of the applicability of the principle I refer to in that. Such, however, is not the case.

In the other area dealing with the recognition of the unconstitutionality of an objective to deprive persons of their right to the Fourteenth Amendment, I call the Court's attention to the fact that in each of those cases, each of them involve a situation in which something was involved, using the swimming pool as an illustration -- where a facility once operated by a governmental agency or municipal, State or county, was then leased or sold and continued to be used for the purpose for which it was intended to be used and the continuation of that governmental involvement in a segregated condition was what was stricken out by the Fourteenth Amendment. Now, certainly it stretches my imagination considerably to see how these parties claimed in this cause, and by any stretch of the imagination, say that at the time of the filing of this suit they were being treated unequal to anyone else in the City of Tallahassee so far as these swimming pools are concerned. The Court's attention is again invited to the Clark v. Forey case which is quite analagous.

THE COURT:

What is the citation on it, if you have it?

MR. RHODES:

237 Fed. (2d) 597. This was a Fourth Circuit decision involving the Legislative Act in which the Court recognizes the proposition being moot.

THE COURT:

Judge Sobell wrote that opinion. I am familiar with that.

MR. RHODES:

This is a proposition that would be support in many other cases within the Fifth Circuit.

In conclusion, the Court's attention is called to Montgomeryy v. Gilman, 277 Fed. (2d) 364.

THE COURT:

Give me that again,

MR. RHODES:

Montgomery v. Gilman, 277 Fed. (2d) 364.

THE COURT:

Do you happen to have the City of Jacksonville case?

MR. RHODES:

Yes sir.

THE COURT:

The citation I mean.

MR. RHODES:

Hampton v. City of Jacksonville, 304 Fed. (2d) 319. This is where the Fifth Circuit affirmed it. There is no continuing citation for Jacksonville discontinuing use of its swimming pools under an order involving total recreational facilities of the City of Jacksonville, where the City of Jacksonville closed down this portion of its city recreation.

In the Montgomery v. Gilman case, involving the closing of the parks in the City of Montgomery, Chief Justice Rives commented:

> "A city is not required to operate public parks and the closing of parks to persons of all races does not deprive citizens of equal protection of the law."

THE COURT:

Judge Rives?

MR. RHODES:

Yes sir. That is the law that covers

this situation.

THE COURT:

You want to say something else, Mr. Brian?

MR. BRIAN:

The only thing I want to inquire-- I know you are leaving on a trip Sunday or Monday -- I hope Your Honor will make your decision prior to your departure.

THE COURT:

Well, certainly I hope that I can. I do want the benefit of -- I think that I have got your citations -- I will go right into those.

MR. BRIAN:

I will have our brief here by 2:00 PM.

THE COURT:

I hope to do so. You can't run a Court, of course, like you would a Ford Motor Company production line. I will try to get it out as soon as

I can and give it to you with due consideration to the matter that this concerns. In the event I take it under advisement, I will take it with me, and if I file it it will be filed here promptly and it will be a matter of public record and there will be no undue delay.

MR. BRIAN:

Thank you, sir.

THE COURT:

Is there anything further to come before the Court?

MR. RHODES:

No, Your Honor.

MR. BRIAN:

No, Your Honor.

THE COURT:

Court will be in recess.

(Whereupon Court stood adjourned until further order)

I, HATTIE BELL LOVE, do hereby certify that the within and foregoing constitutes a true and correct transcript of my shorthand notes and Audograph recording taken on July 16, 1965, in Tallahassee Civil Action No. 1073, ROCHELLE STEELE, ET AL., VS. GEORGE B. TAFT, MAYOR OF THE CITY OF TALLAHASSEE, ET AL., on MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

This December 16, 1965.

Hattie Bell Love

OFFICIAL COURT REPORTER

FILE

JUL 21 1965

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROCHELLE STEELE, et al., :

Plaintiffs, :

v. : TALLAHASSEE CIVIL ACTION NO. 1073

GEORGE B. TAFT, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - -:

ORDER OF DISMISSAL

On May 21, 1965, complaint was filed by plaintiffs alleging, basically, Constitutional violations by the named individual defendants, all of whom have some official capacity with the City of Tallahassee, and seeking affirmative relief in the form of an order from this Court directed to the City of Tallahassee, through its said officers, to open and operate three swimming pools owned by the City and closed since July, 1964.

Counsel of record for plaintiff, Mr. John Due, presented to the Court associate counsel, Mr. Jack Brian, as a member of the Bar of the State of Pennsylvania and who has been previously admitted to practice before the United States District Courts and Court of Appeals of the Third Circuit and to the Supreme Court of the United States. In accordance with usual practice, upon motion of counsel duly ad-recognized and presented arguments in behalf of the plaintiffs. Mr. Roy Rhodes, Attorney for the City of Tallahassee, appeared to present arguments in behalf of defendants. Counsel for both parties have waived any objection to timeliness of notice for this hearing, and counsel for the City of Tallahassee reserved right to argue pending motions with respect to sufficiency of service and service of process and pending determination of the defendants' respective motions to dismiss the complaint for failure to state a cause of action. It was to the motion to dismiss for failure to state a cause of action that counsel addressed themselves, and which is now before the Court.

With admirable candor counsel for the plaintiffs concedes that a number of cases virtually identical in point here have been resolved in favor of the defendant city. See Hampton v. City of Jacksonville, Florida, 304 F.2d 319 (5th Cir.); City of Montgomery, Alabama, v. Gilmore, 277 F.2d 364 (5th Cir.); Tonkins v. City of Greensboro, North Carolina, 162 F. Supp. 549; and Clark v. Flory, 237 F.2d 597 (4th Cir.).

Plaintiffs contend, however, that these cases are now overruled by the opinion of the Supreme Court of the United States in Griffin v. County School Board of Prince Edward County, Virginia, 377 U.S. 218 (1964). A careful reading of the Prince Edward County case convinces this Court that there is nothing contained therein which gives substance to plaintiffs' argument here. The distinctions between that case and this are numerous and apparent. This Court can find nothing in the language of the opinion which would indicate that municipalities can be compelled by Court order to open and operate swimming pools, the basic reasons for which have been fully and adequately set forth in the first four cases cited above. It is noted especially that there could be no discrimination prohibited by the Constitution in the total failure to maintain the facilities such as all of the swimming pools under the control of the City. The failure to render such discretionary service by the City may well be subject to valid criticism as a matter of public policy. On the face of it such policy may seem tragically absurd, but such decision is clearly under the law a function and responsibility of the elected public officials and the officers and employees working under them. The City concedes, as it must, that these facilities cannot be leased, or otherwise allowed to be operated by others to effectuate a racially discriminatory policy. The undisputed fact here, as shown by the complaint itself, is that the pools are not being operated at all.

In consideration of the foregoing and upon the line of established authorities cited by counsel for both plaintiffs and defendants, it is, therefore, hereby

ORDERED that the motions of the respective defendants to dismiss the complaint against them, individually and collectively, for failure to state a cause of action be and they are hereby granted.

DONE and ORDERED in Chambers at Tallahassee, Florida, this 16th day of July, 1965.

G. HARROLD CARSWELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

ROCHELLE STEELE, et al.)
)
Plaintiffs)
)
v)
)
GEORGE S. TAFT, et al.)
)
Defendants)
)

Civil Action No. 1073

AMENDED DESIGNATION OF RECORD

The plaintiffs hereby amend and clarify their designation in the above entitled action. They hereby designate to be included in the record upon the appeal of this cause, all:

pleadings,
motions,
briefs,
orders, and
papers pertaining to the appeal of this cause

filed or entered in this action.

John D. Due, Jr.
540 1/2 West Brevard Street
Tallahassee, Florida
Attorney for Plaintiffs

ACKNOWLEDGEMENT OF SERVICE

I hereby acknowledge receipt of a copy of the above Amended Designation of Record this 2 day of August, 1965.

Roy T. Rhodes

by____________________
Attorney for Defendants

Rivers Buford

by____________________
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE, DIVISION

ROCHELLE STEELE, et al. Plaintiffs v GEORGE S. TAFT, et al. Defendants	Civil Action No. 1073

I, John D. Due, hereby certify that a copy of the accompanying amended designation of record has been mailed, postage prepaid, to Rivers Buford, an attorney for the defendants in this action on this date, August 2, 1965, at his office address, the Midyette Moor Building, Tallahassee, Florida.

John D. Due, Jr.

Tallahassee

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROCHELLE STEELE, et al., *
Plaintiffs, *
-vs- Civil Action No. 1073
GEORGE S. TAFT, et al., *
Defendants. *

DEFENDANTS-APPELLEES DESIGNATION OF RECORD

The Defendants-Appellees, by their undersigned attorneys, hereby designate the following portions of the records, proceedings and evidence to be contained on the record on appeal taken by the Plaintiffs-Appellants in this cause in addition to those heretofore designated by the Plaintiffs in their Designations of Record.

1. The entire proceedings before the Court on the hearing held July 16, 1965.
2. Plaintiffs' Notice of Appeal.
3. Plaintiffs' Designation of Record.
4. Plaintiffs' Amended Designation of Record.
5. This Designation of Record.

ROY T. RHODES
102½ South Monroe Street
Tallahassee, Florida

City Attorney

I HEREBY CERTIFY that a copy of the foregoing have been served by mail on John D. Due, Jr., 540½ West Brevard Street, Tallahassee, Florida; Bruce Rogow, 540½ West Brevard Street, Tallahassee, Florida; and Carl Rachlin, 38 Park Row, New York 38, New York, this 12th day of August, 1965.

ROY T. RHODES

Tallahassee

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROCHELLE STEELE, et al., :
Plaintiffs, :
vs. :
GEORGE S. TAFT, et al., : TALLAHASSEE CIVIL ACTION
Defendants. : NO. 1073
- - - - - - - - - - - - - - - - :

ORDER FOR EXTENDING TIME FOR FILING RECORD ON APPEAL

It appearing to the Court that the record on appeal cannot be filed and docketed in the United States Court of Appeals within the time allowed by law, it is, therefore, hereby

ORDERED that the time for filing the record on appeal in the United States Court of Appeals be extended to and including the 21st day of October 1965.

DONE AND ORDERED in Chambers at Tallahassee this 1st day of September 1965.

G. HARROLD CARSWELL

G. HARROLD CARSWELL
United States District Judge

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SN.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

ROCHELLE STEELE, et al.,

Appellants,

v. Civ. Case 1073-65

GEORGE B. TAFT, et al.,

Appellees.

MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE ORAL ARGUMENT APPEAL

Appellees respectfully suggest to the Court that the asserted urgency for special disposition of this cause as suggested by the Appellants in their Motion to Advance this Cause is not suggested by the record.

The closing of the City of Tallahassee Municipal Swimming Pools occurred on July 4, 1964 (R-7).

It was not until over ten months later on May 21, 1965, (R-1) that Appellants filed suit attacking such closing.

Not until almost two months after the filing of the Complaint did the Appellants on July 14, 1965, (R-14) move for a Temporary Restraining Order and Preliminary Injunction. It should also be noted that the Motion for Temporary Restraining Order and Preliminary Injunction was not filed by the Appellants until after the court below had scheduled arguments on the Defendants' motions to dismiss. (T-4)

In Paragraph 10 of the Affidavit accompanying the Motion to Advance this cause, argument is made as to the urgency of this cause but if the cause were as urgent as claimed, this cause would have been filed by the Appellants during the summer of 1964 and would most likely have been completely disposed of now.

Attention is also respectfully called to the fact that the Motion to Advance this Cause implies that this court has authority to enter an order requiring the reopening of the pools without their having been taken any testimony or evidence in support of the allegations of the Complaint. If it is ultimately found that the court below erroneously dismissed the Complaint then this cause would have to be remanded to the court below for a trial on the merits.

Respectfully submitted,

Roy T. Rhodes

Roy T. Rhodes
102½ S. Monroe Street
Tallahassee, Florida
City Attorney

Rivers Buford Jr.

Rivers Buford, Jr.
204 N. Gadsden Street
Tallahassee, Florida
Assistant City Attorney

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above Memorandum were served, by mail, on John D. Due, Esquire, 540½ W. Brevard Street, Tallahassee, Florida, and on Carl Rachlin, Esquire, 38 Park Row, New York, N. Y., this 13th day of April, 1966.

Rivers Buford Jr.

Attorney

OFFICE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

ROCHELLE STEELE, ET AL.

Plaintiffs

CIVIL CAUSE

VS.

NO. 1073

GEORGE B. TAFT, ET AL.

Defendants

HEARING ON MOTIONS TO DISMISS AND MOTION FOR PRELIMINARY INJUCTION

BRIEF FOR PLAINTIFFS

____

John D. Due, Jr.
540 1/2 West Brevard Street
Tallahassee, Florida

____

Carl Rachlin

____

Jack Brian

STATEMENT OF FACTS

Two days after the President of the United States signed into law the Civil Rights Act of 1964, several Negro citizens of Tallahassee, Florida, attempted to exercise their rights as guaranteed therein. These citizens attempted to use the previously "all-white" Levy Park swimming pool in Tallahassee. Because of their race, they were wrongfully denied entrance to the pool. Moreover, the same afternoon, with no officially announced justification, the City Manager ordered that all the city's public pools be closed. The pools have remained closed since that date. This closing of the pools served to perpetuate the policy, practice and custom of discrimination with regard to public facilities, in blatant disregard of the Fourteenth Amendment of the United States Constitution and the newly effective Civil Rights Act.

DEFENDANTS RIGHTS TO CLOSE THE POOLS ARE LIMITED BY THE CONSTITUTION

Certainly it is possible that defendants, in many circumstances have a right, sometimes even a duty, to close public facilities. However, in the words of Mr. Justice Holmes: "acts generally lawful may become unlawful when done to accomplish an illegal end...a constitutional power cannot be used...to attain an unconstitutional result". Western Union Telegraph Co. v Foster 247 US 114, 38 S. C. 439. (1918). The legality of an act depends not upon the "nature" of the act in relationship to the circumstances which affect it. Only when considered in context can the legality of an act be judged. In most situations there could be no question of the legality of a decision regarding the management of public property, for example the building of a new school, the leasing of a swimming pool or golf course, or the closing of a manufacturing plant. Still these acts have been held to be illegal when seen in relationship to all relevant circumstances. Taylor et al v Board of Education of the City School District of New Rochelle,

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198 F.Supp. 181 (U. S. D. C., New York, 1961); Lawrence v Hancock, 76 F. Supp. 1004 (U. S. D. C. West Virginia, 1948); Simkins v City of Greensborough, 149 F. Supp. 562 (U. S. D. C. North Carolina, 1957); Textile Workers Union of America v Darlington Manufacturing Company et al., 377 U. S. 903, 85 S. C. 994, 13LEd2d 175 (1965).

Defendants' powers over public swimming facilities can never transgress the limitations set by the Fourteenth Amendment. It has been held that "the power ~~or~~ To lease does not include the power to discriminate against members of a minority race in the exercise of their constitutional rights, nor can the city by such a lease relieve itself from its constitutional obligation to afford all its citizens equal rights in the use of the public swimming pool which is the subject of the lease." Lawrence v Hancock (Supra). Nor does the power to sell "include the power to discriminate against members of any race." Tate v Dept. of Conservation and Development, 133 F. Supp. 53, (U. S. C. C. Virginia, 1955).

PLAINTIFFS ARE ASSERTING THEIR LAWFUL RIGHT TO BE FREE FROM DISCRIMINATION

Plaintiffs could not and do not assert any absolute right which enables them to force the City of Tallahassee to build and operate swimming pools. They do, however, have A the right which they now pray this court to enforce. And that is the right to swim in the pools, now existing, which were closed in order to continue the discrimination against them and the members of their class. It is this right, to be free from racial discrimination, which is in question-not simply a "right to swim."

The existence of one right is not condition ed upon the existence of the other, as the Supreme Court has held in analogus ous cases. For example, it is certain that no man has a right to government employment. The Federal Government may fire a man for cause or without cause, but that man has the right to be secure against being fired for an illegal cause. As the court said in Wieman v Updegraf, 344 US 183, 73 SC 215, 97 LE2d 216,: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." See also Torasco v Watkins, (367 US 488, 81 SC 1680, 6 LE2d 982 1961), which reaffirms the constitutional right to be protected against discrimination in an activity, independent of whether the activity is itself a "protected right" under the Constitution.

Defendants' right to close the public facilities is consequently subordinate to plaintiffs' constitutionally protected right to be free from discrimination.

DEFENDANTS' MOTIVE IS UNCONSTITUTIONAL

Defendants' motive in closing the public pools was ✓ to deprive the plaintiffs of Fourteenth Amendment rights; the defendants' action in implementing their intention was a violation of these rights. Actual or intended state or municipal actions have often been evaluated in terms of motive or purpose, and have been thereby invalidated and enjoined by federal courts. See for example Tate v Dept. of Conservation and Development (Supra), and Derrington v Plummer 148 F. Supp. 326 U. S. D. C. Texas, 1955) and 240 F2d 922 (1956).

In Derrington v Plummer, the court focused upon the relationship of the acts of a private lessee to the state. Its inquiry into the extent to which the lessee's acts could be deemed those of this lesser, the State, carried it to an appreciation of the importance of evaluating the "propriety" of state actions vis a vis the Fourteenth Amendment. "When there is no purpose of discrimination, no joinder by the county in the enterprise, or reservation of control by it, it may

OFFICE 4

lease for private purposes...and the lessee's conduct in operating the lease Hold is...not state action requiring that it be used in accordance with the Fourteenth Amendment." (Ibid.,)

Although a leasing of public facilities can be distinguished from closing as to its effects, a proper basis for invalidation can be found in the identical ends to which these techniques are only separate means. The Tate case confirms this view that the underlying purpose of an act can ~~not be~~ ONLY BE examined by a court, but may also be determinative as to the legality of the act.

In the Simkins case (Supra p. 565) the court decided to enjoin a lessee from operating on a discriminatory basis. It based its decision upon an examination of the lessor's motives in leasing the property and a finding that the purpose of leasing the property was to enable it to remain segregated. The most important case in this regard is that of Griffin v Board of Education of Prince Edward County et al., 377 US 218, 84SC 1230, 12LE2d 256. There the court did not hesitate to examine and condemn the motives behind the closing of the schools of Prince Edward County to avoid desegregating them; "the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their stead with state and county assistance, for one reason only; to insure through measures taken by the county and the state, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever non-racial grounds might support a state's allowing the city to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as Constitutional." (Ibid.,)
(emphasis supplied)

It should be noted that the court forced a reopening of the schools in spite of the fact that Virginia law had made public schooling a local option. Just as it is open to Prince Edward County to provide schools or not as it pleased, so it is open for a municipality to decide whether or not it will build and maintain swimming pool facilities. Nevertheless the Supreme Court forced Prince Edward County to reopen the public facilities which it had seemed to be their "option" to close. In the same way, the defendants here should not be allowed to take refuge behind what they conceive to be their discretion.

our addition
– not in original brief at all

DISCRIMINATORY EFFECT OF CLOSING POOLS

The Negroes of Tallahassee have suffered two kinds of discriminatory injury as a result of the closing of the pools. First they have suffered and continue to suffer from intimidation which precludes their capacity to assert certain other constitutional rights. Secondly they have sustained and continue to sustain injury which substantially exceeds that affecting the white community. Were this tactic to be approved by the court, the Negro citizen would necessarily be hesitant about asserting his rights to use other public facilities. He could only reason that his city has the power as well as the intention to close all public facilities rather than allow him his right to integrated facilities. He could then assert his rights only at the risk of having no parks or pools or golf courses available to him at all. He could insure for himself the use of some facilities (albeit segregated) only by prostituting his constitutionally guaranteed right to integrated facilities. Moreover, were this tactic to be approved, the Negro citizen would necessarily suffer a greater injury than his white counterpart. This court cannot ignore the Negro's lesser capacity to provide private substitutes for what should be a public facility.

Not in original brief (will at least completely rewritten)

The technique of closing one type of facility in order to intimidate citizens from exercising their legal rights to use other facilities has been stopped by the Supreme Court in several cases. Even when the plaintiff's legal right was merely statutory and the defendant was a private corporation instead of a municipality with public duties. In Textile Workers Union v Darlington Manufacturing Co., (Supra), the defendant, an employer, closed one of several manufacturing plants in retaliation against his employees' attempts to exercise their right to organize into a union. The court made it clear that if the plant was closed by a single employer for discriminatory purposes and its effect would be to discourage employees in his other plants from attempting to exercise their legal right to organize, the closing could be enjoined. The court went on to say that "a discriminatory partial closing may have repercussions on what remains of the business affording employer leverage for discouraging the free exercise of Section 7 rights among remaining employees...a partial closing is an unfair labor practice under Section 8 (a) (3) if motivated by a purpose to chill unionism in any of the remaining plants of a single employer and if the employer may reasonably have foreseen such closing will likely have that effect." (Darlington, Ibid.,)

So it is in the case now before the court. If plaintiffs' first desire, to exercise their right to have integrated public facilities, is denied, their second choice may have to be to accept unconstitutional, segregated facilities or have none at all. The defendants here have attempted to exploit plaintiffs' need for recreation and other facilities by threatening closing in the same way that an employer might exploit his employees' fears of plant closings. If the courts have the power to enjoin closing to protect a statutory right, a fortiori they should be able to enjoin closings by public officials in order to protect constitutional rights.

[illegible] Many and ingenious are the tactics which have been used in attempts to escape the effects of Brown v Board of Education and cases following it. States have attempted to provide aid to segregated private schools in ~~many~~ many ways. Often these statutes and rulings have deprived Negroes of their rights and as often have they been declared unconstitutional. Busch v New Orleans School District-Parish, 188 F. Supp. 916 (1961). Public officials in many states, counties, and municipalities, forced to desegregate, have utilized the same techniques to perpetuate segregation of public facilities. When these techniques have been used to ER prepetuate racial discrimination, they have often been declared unconstitutional and should be so found here.

The legal effects of closing these public facilities ~~should~~ would not be altered substantially by the fact that whites too are not allowed to use them. The white citizen does not suffer from a separate (but necessarily unequal (Brown v Board of Education)) situation which is controlled by his fellow white citizens. As the Supreme Court said in Shelley v Kramer, 334 US 1, 68 SL 836, 92 LE 1161 (1948): "...the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the court may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

THE RELIEF WHICH PLAINTIFF SEEKS IS THE PROPER RELIEF

In the case of Tonkins v the City of Greensborough, 162 F. Supp. 549 (1959), a situation much like the one now before the court was presented and injunctive relief was denied. ?

Tal vs Gordon

1. Section 902.19 (4) states, "No sheriff, deputy sheriff, constable, highway patrolman, or other person employed or paid by the state or any county thereof as a law enforcement officer, shall be entitled to witness fees or to mileage when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence."

As the municipality has adopted the Florida Statutes relevant herein as ordinances, the force of this section acts on all employees of the Tallahassee Police Department as well as those specified in the statute. Furthermore, the enabling class of the statutes forbids ordinances contrary to these statutes, and would, by implication, apply to municipalities anyway. It is clear that the city enforcement officers are not held to lower standard than those of the county or state.

Witness Dillard admittedly was in the employ of the police department to enforce the law as a member of the vice squad. He received, according to his testimony at trial, $5.00 for each night he worked.

He further stated that he received an additional $5.00 for going "back down to the police station and [- giving] statements and [putting] in a lot more time."

In essence, this is a fee for giving testimony upon which the prosecutor will file his information. This is a naked violation of the statute.

The legislature made clear in numerous ways its intent to have the statute cover such proceedings. This section was passed in 1939, as was the remainder of chapter 902, under the heading of Preliminary Examination. The intent of this chapter is to regulate the procedures leading up to the indictment and trial of the accused, and in so doing, protect the rights and liberties of said accused, the intent of this statute is not to limit the payment of fees of police officers for the legislature intentionally left to other provisions; the purpose of this provision was to make sure the accused; rights were not put in jeopardy as a result of testimony purchased by means of what appeared to be a witness fee. The importance of keeping police integrity high and unquestioned was realized by the legislature and therefore the statute was phrased so as to exclude the necessity of proving actual bias. The legislature wanted to prevent the possibility of bias. Furthermore, such payment was not intended to be used as discrediting the witness, for if that were the intent, this provision would have been put under the section concerning the rules of evidence. Clearly, this is to be a rule to protect the integrity of the legal and judicial procedure. It is a prophylactic rule, and must be such, in order to carry out that intent. Hence, a procedure violating such a rule must be invalidated in order to carry out the intent of the rule and to preserve the integrity of our legal system.

2. 90.141 of the Florida statutes provides, in toto,

> Any law enforcement officer of any municipality, county or state who shall appear as an official witness to testify at any hearing or law action in any court of this state as a direct result of his employment as a law enforcement officer shall be entitled to per diem and traveling expenses provided for state employees under §112.061.

112.061 is concerned solely with traveling expenses, and not with payment of time used in "putting in a lot of time." Time is of no concern to this statute.

Under 112.061, any office or department or commission or unit of government created pursuant to law is an "agency". Clearly, then, a police department of municipality is an agency and governed by the direction of this statute.

112.061 (10b) provides, that "Each agency shall promulgate such additional rules and regulations as may be necessary to effectuate the purposes of this section. Such rules and regulations shall be recorded in the official minutes of the agency or maintained in a special file in the main office of the agency."

It is clear then that the police department may set up regulations which provide for fees concerned with traveling only; payment for time "put in" is not permissible.

Nor can this fee be interpreted as overtime since it is clear from the witnesses own statement that it is the work of testifying that he is being remunerated for; if he had not accused anyone, he would still be "investigating" under the original $5.

Hence, such payment violates the prohibition of the statute. It cannot be said that this statute (112.061) is solely for the purpose of determining what travel expenses are recoverable and what are not. Clearly, it is also to prevent the use of travel expenses as an inducement for supporting testimony. The legislature wants the police to testify out of duty not from the possibility of financial gain. The respectn and admiration of the police department by the general public is too important to the judicial process and the well being of society as a whole to leave to the sly machinations of the corrupt forces that attempt to subvert the cause of justice. The legislature foresaw the danger and attempted to keep the duty of the law enforcement officers a above the market place, inviolate, and ____________________. By limiting fees only to well-defined special travel expenses, such a goal is accomplished. The first compromise for expediency will be the first crumbling of the integrity of the protectors of our society.

Here, Dillard states that he became employed part-time for the police department for the specific purpose of earning extra money. The witness fee he received, forbidden by statute, is just that extra money. Nothing will arouse public outcry and mistrust of police more than such questionable procedures. No matter how infamous the crime, a conviction ______________ based upon a procedure so inherently laden with threats to the integrity of our society is not worth the price. The conviction clearly must be invalidated.

3. The legislative intent on passing §90.141, 112.061, and 902.19 was clearly to prevent, inter alia, the payment of witness fees ____ to persons in the employ of any police department within the state. Points 1 and 2 above make this evident. Indeed a conviction based solely on the purchased testimony of one witness is so ______________"unfair" as to be violative of the requirement of due process.

IT IS A VIOLATION OF DUE PROCESS TO BASE A CONVICTION SOLELY ON THE TESTIMONY OF AGENT WHO RECEIVES A FEE CONTINGENT UPON MAKINE AN ARREST

It has long been held that the most relevant consideration when determining if a procedure violates the dictates of the constitution, irrespective of good faith or bad faith of the prosecutor, is, has the accused been accorded a fair trial.

In applying this test the Supreme Court has found that a procedure wherein a judge would receive the costs paid by defendants in case of conviction was inherently unfair. Tumey v. Ohio 273 U.S. 510 (1927). Tumey stands for the proposition that a "possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." Id at 532. The Court made no finding nor did they see any need for actual bias or influence; they were eliminating the "possible temptation."

Similarly in In Re Murchison 349 U.S. 133 (1954), Justice Black wrote for the majority, "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law endeavors to prevent even the probability of unfairness."

After noting the high standard that due proces s maintains for the judicial tribunal as employed in Tumey, Justice Black continued, "Such a strigent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its highest function in bhe best way "justice must satisfy the appearance of justice." Offutt v. United States 348 U.S. 11, 14." In Re Murchison, supra at 136.

It should not be necessary to show actual prejudice as prerequisite for reversal. The Supreme Court has often found instances where insolatable prejudice is not necessary to invalidate a conviction. Though it is true that in most cases involving claims of due process deprivations a showing of identifiable prejudice to the accused is required, nevertheless, at times a procedure employed by the state involves such a probability that prejudice will result, that it is deemed inherently lacking in due process. In Re Murchison, supra, Turner v. Louisiana 379 U.S. 466 (1965), Rideau v. Louisiana 373 U.S. 723 (1963), Estes v. Texas 381 U.S. 532, 1965, et. al.

In Rideau, the Court found that televising the defendant in the act of confessing was inherently invalid under the due process clause without showing that actual prejudice resulted.

Again in Turner the court struck down a conviction because two deputy sheriffs who were the principal prosecution witnesses also had custody of the jury, freely mingled and conversed with them throughout the trial. No actual prejudice was shown: it was not even demonstrated that the officers spoke to the jurors about the trial at all. The court relied upon "the extremem prejudice inherent in this continual association throughout the trial between the trial jurors and these two key witnesses for the prosecution." Turner v. Louisiana supra, at 433.

Similarly, in Gideon v Wainwright 372 U.S. 355 (1963) and White v. Maryland 373 U.S. 57 (1963) practices were found to violate a notion of fairness fundamental to requirements of due process, without actual prejudice having to be shown.

Estes v. Texas supra, found that the use of television cameras in the courtroom was inherently violative of due process notions of fairness; no prejudice was required by the opinion of the court although three concurring judges found actual prejudice.

The business and chief function of the trial procedure is to ascertain the truth. The above lines of cases stand for the proposition that the "criminal trial under our constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt and no procedure or occurence which seriously threatens to divert it from that purpose can be tolerated." Warren, C.J., concurring in Estes v. Texas supra, at 564. Such an interpretation should invalidate the procedure used to arrest the defendant below.

The defendant was arrested for "soliciting to commit a lewd and lascivious act: to wit ________________. He allegedly made the solicitation to a college student employed part-time by the vice squad of Tallahassee police department. According to the witnesses own testimony, he was paid $5.00 a night for "investigating", R. 29, but if we made cases, it took much more work. We had to go back down to the police station and give statements and put in a lot more time and we were paid $10.00 a case, R. 29. The job of a member of the vice squad is to do more than observe. The ultimate goal of any police investigation is to capture criminals: part of this job, under our system of law, is the procedure leading to arraignment-- an area in which the arresting witness testimony is vital. It is (absurd) to be paid an additional fee, over and above the salary paid for the job, for doing something part and parcel of that job. It becomes more absurd when it is realized that the police employee, when giving testimony cannot be in the field tracking down culprits for which he is getting paid his original salary, and as a result, if this dichotomy between parts of the same job is recognized, the witness is getting paid for doing two things at once and being two places at once. Testimony of the police employees' superior officer also makes this interpretation of questionable legal merit. At 61 of the record, Lieutenant Burl Peacock in charge of vice investigation (R. 56), while denying that the fee xin sontingent on convictions, admits that the fee is paid for persons apprehended, and if no one is apprehended, the additional fee is not paid. Further, as if to make the procedure more repugnant, Peacock asserts that if the employee worked for a two hour period he would get an additional fee for an arrest, purportedly for "extra work", but regardless if the arrest did not require more time than this two hour period. In other words, if the arrest was made early in the two hour period, it is highly likely that this more intense work in the police station would not require the full two hour period: yet the extra fee would be paid. Similarly, if the arrest was made at the end of the two hour period and the employee had to work extra time, he would still get the same fee, no more.

Hence, the possibility of extra time does not seem to be relevant in the payment of the extra fee; it is given for the activity of giving statements in the police station. There can be only two reasons for the ____________ fee: (1) To pay for additional work and to get more arrests. The employee did not have to do more work he has to make a statement as to what happened, it's a part of his job. It does not take an unusually long time to do. Nor does it require a great deal of time, it simply cannot justify doubling the employees salary.

The fact cannot be denied that the fee is contingent on the making of an arrest, even if the fact of giving statements is believed as crucial. This is admitted by Peacock, as noted above, this can, in no way contribute to the fairness or accuracy of crime detection. It introduces a factor that can, quite conceivably affect the normally objective police judgment. When the fact that the witness joined the police for this part-time work in order to make more money, the procedure becomes clearly intolerable. The witnesses own words present the repugnancy of this factor most clearly from a jurispurdential view; he said in response to counsels' question as to how he became employed with the City R. 32: "Well, when I first moved over here to go to school I was acquainted with Sargeant Hanes and Sergaent Peacock and I mentioned to them that I would like to have a part-time job to make some extra money."

When a young student in need of money is hired and told that he will make even more money if he makes arrests, no matter what the rationale of that contingency may be, the chance of his judgment being affected is too great for our system of law to tolerate. In ________ an experienced judge, with expert knowledge of the legal system, and a high view of the importance of ____________ judicial process in the community, was disqualified due to the possibility of receiving part of the fine imposed on a conviction. He was an experienced and learned public official who was also the Mayor of the town. Surely a procedure making a fee contingent on arrest ________________ did process when due presiding $91.00 youngster whose sole purpose in taking the job is getting monetary remuneration, and who is not keen to the responsibility of the police in the community.

"The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey* v *Ohio supra* at 532. It is not relevant, even if susceptible to proof to show that the person in the employ of the Tallahassee police department was of such noble character that this contingent fee would not affect his perception. The potential effect of money on a person's judgment is a fact of life. "In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" *Federalist Papers*, (Italics in original). Similarly, psychological experiments are legion with examples of the effect of reward on a person's judgment. It should be enough to demonstrate the *possible* effect on the witness's testimony to void the entire procedure. History supplies a ______________ of instances of how money has purchased opinions of public office at all levels. There will always be people who will accept ___________ and ____________, and more generally, who will go to any length to _____________ money. There should be no opportunity for such ___________ to _____________ their greed in the uniform of the police. ______________________________________ present procedure establishes a vehicle for such a person to pursue his _______________ goals should be sufficient to void it.

Furthermore, psychological _____________ have shown us that the judgment of even the most scrupulous of people are unconsciously affected by the __________________________ or other rewards.

Studies by certain authorities have shown that people will actually see certain phenomena if reward is contingent on their so doing. One experiment showed how very intelligent people swore that they saw a light move to the left when a friend said "look at the light move to the left;" this occurred even though the people were scrupulously honest and had perfect vision.

Others have shown that people will change their attitude toward things for a reward. Hence, people who think that something is very wrong will compromise when the situation presents a great reward for doing that thing.

Some experiments have shown that the passage of time has aided people in changing their recollection because they did things they were sure were just and morally right. They tend not to recall the facts the same way they did originally but insist as strong if not stronger that the present recall is accurate.

Further studies have shown that people will see things happen when they expect them to occur. Solomon Asch's studies have shown instances where people say they saw Negroes commit crimes in a movie or a picture, but close examination later shows that the movie and pictures do not reveal such occurences. Most of these people believed that Negroes were equal and believed that they were capable of objective judgment of a situation and could report accurately what happened in a given situation.

Examples are legion in the history of law as to how witnesses who probably believe they are telling the truth give false testimony; they may be scrupulously honest people but because of unconscious prejudices and the psychic influence of the implementation of an expectation in the mind of the observer, they give inaccurate testimony.

The force of the above discussion is this: the added payment to a member of the policeforce for finding violators of a certain law creates a great danger of either causing the employee to wrongfully arrest certain individuals in order to acquire the fee, or causing a normally honest man to see occurences in innocent but ambiguous situation that he must see in order to collect the extra fee... Possibly the law would be willing to take this risk if an over-riding good would result from this procedure. However, this contingent fee in no way serves the pursuit of justice-- finding criminals is part of the policeman's job; if he is conscientious, he will find the criminal anyway and if he is lazy and cheats behing his superior's back he will tend not to care whether the accused is innocent or guilty as long as he gets the added fee. Furthermore, in the latter case, the people arrested will tend to be those that can least defend themselves, a result the ________ wants to avoid.

The fault of this procedure lies in "the insidious influences which it puts to work in the administration of justice." Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1 (1960). The court has found instances in which a showing of actual prejudice is not necessary; this is done where "the procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." Even this, it is here maintained, is ~~xh~~ such a case. The requirement of due process should not let an officer of the court be in such a position as to have his opinion and judgment affected by so ignoble a motive as monetary gain. The entire judicial process is impregnated with the potential poison that can leak from such an opening.

Furthermore, the interest in publicconfidence of the dignity and reliability of the police practices and court procedures is also a ~~pxxf~~ powerful argument against allowing this procedure to flourish. There was public outrage at the use of college students in Northern Florida. (Cite newspaper articles), public confidence is undermined in both the police and the level of justice in the country.

This procedure is the type Chief Justice Warren was referring to when he said due process cannot "tolerate" those procedures that seriously threaten to divert the criminal trial from the fair and reliable determination of guilt. Estes v. Texas at 564. It must be held to be a violation of due process.

ARGUMENT R/C

Under Escodedo and prior decisions, once the right to counsel attaches, it may not be lost by a failure to request counsel.

Powell v Alabama, 287 U.S. 45, (1932) held that in capital cases the failure of the trial court to appoint counsel is a violation of the due process standard of the Fourteenth Amendment. Since Powell case was decided 34 years ago, the right of the criminally accused to have the benefit of counsel has been constantly expanded, both in concept and application. The court has devised various tests in order to determine when the right to counsel attaches, but one that is increasingly articulated is that the right is present whenever a "critical" stage of the proceedings has been reached. Hamilton v. Alabama, 368 U.S. 52 (1961).

In a series of cases, it has been held the arraignment state was critical, Hamilton v. Alabama, supra, White v. Maryland, 373 U.S. 59 (1963); that the right is present before arraignment but after indictment Messiah v. United States, 377 U.S. 201, (1964); and finally, with the decision in Escodedo v. Illinois, 378 U.S. 478 (1964) that in certain circumstances, the right to counsel attaches before indictment.

The petitioner in Hamilton v. Alabama had been charged with house-breaking and was arraigned with appointed counsel. Subsequently, there was an arraignment on a related charge without the benefit of counsel. The plea was not guilty. In reversing the conviction, the court found that arraignment was so critical a stage of Alabama's criminal procedure that denial of counsel at that stage was violation of the Fourteenth Amendment. This was true even though no particular prejudice to the petitioner was shown to have resulted from the absence of counsel. This decision rested on the peculiar facts of Alabama procedure, wherein the defendant had to raise certain defenses at arraignment or else they were irretrievably lost to him. The thrust of this decision goes to the unique import of the stage in the criminal procedure and would be binding as to any similar stage in the procedure used to convict the defendant below.

Maryland criminal procedure provides for a preliminary hearing prior to formal arraignment. The accused in White v. Maryland was arrested on a murder charge and brought before the magistrate. Without the assistance of counsel he pleaded guilty to the charge. Later, a formal arraignment was had, and in the presence of counsel, the plea entered was "not guilty" and "not guilty by reason of insanity". At the trial the original pleas was admitted into evidence and the defendant was convicted and sentenced to death. Although the court recognized that the original hearing was not a formal "arraignment" it concluded that here, as in Hamilton, the particular stage of the proceedings was so critical that the presence of counsel was required and the denial of that right warranted reversal of the conviction.

Gideon v. Wainwright 372 U.S. 335 (1963) held that the Sixth Amendment right to counsel was made obligatory upon the states by reason of the Fourteenth Amendment. The effect of Gideon has been to further expand the Sixth Amendment protection afforded the accused and and to use the violation of this protection as an independent ground for the exclusion of confessions. In the wake of Gideon, two decisions by the court dealing with this problem are important for our considerations here.

The first of these is Messiah v. United States, supra. The petitioner charged with a narcotics violation had been indicted and released on bail. The co-defendant had decided to cooperate with the authorities and allowed them to wire his car with electronic listening device. Subsequently, petitioner made ~~xxx~~ several incriminating statements while conversing with his friend in the latter's car. These remarks were overheard by the authorities and at trial they testified as to what they had heard. The court set aside the conviction on the ~~xxx~~ ground that the Sixth Amendment right to counsel had been violated. It held that any statements made during the absence of counsel in the critical period were inadmissable at trial.

Less than a month later, Escobedo v. Illinois was decided, and which sould govern the present case.

Danny Escobedo was arrested in connection with the murder of his brother-in-law and later ~~xxxxxxx~~ released. He retained counsel to ~~xxxxxxx~~ represent him.

The authorities arrested another man who implicated Escobedo in the murder. For the second time, Escobedo was taken into custody and interrogated about his knowledge of the crime. He refused to answer and asked to see his lawyer and was denied. During the interrogation, Escobedo's lawyer appeared and demanded to see his client but was told that it was impossible under the circumstances. Incriminating statements were finally elicited from Escobedo and used at trial. On review before the Supreme Court, Escobedo contended that even before formal indictment, under the circumstances presented by the facts of the case, the Sixth Amendment right to counsel attached, and denial of that right excludes any statements made during the absence of counsel. The Supreme Court agreed with him. The court held:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into custody (police), the police carry out a process of interrogation that leads itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute right to remain silent, the accused has been denied ~~[illegible]~~ the 'Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as made obligatory upon the states by the Fourteenth Amendment..., and that no statement may be used against him at a criminal trial. 378 U.S. 478, 490, 491.

In the present case, the investigation had focused clearly on the defendant; he was taken into custody and "booked", to await the setting of bail. Rec. p.42. The police had whatever evidence they were going to produce at trial, and the only purpose to their alleged discussions with defendant would be to elicit incriminating statements. There is a wide discrepancy between the defendant's description of what happendd in the police station and that of the two police officers, Hanes and Peacock. Included in Peacock's testimony are allegations as to purported admissions of act by the defendant. If he is to be believed, and therefore the defendant disbelieved, great damage is done to the defendant's credibility and therefore to the possibility of his being believed over the prosecution's witness, Dillard. In the present case, it is the defendant's word against Dillard's as to whether a solicitation was made by the defendant. The fact that Dillard had a financial interest in arresting defendant could have greatly injured his credibility. The thrust of Sergeant Peacock's testimony is to introduce admissions of defendant in an effect to buttress the truthfulness of Dillard's testimony, and to discredit the present credibility of defendant.

Appellant here maintains that even if Sergeant Peacock did advise defendant he could have an attorney, (R.p. 57) and that defendant wanted to discuss the charges further R.p. 57, and that defendant admitted that the facts as Mr. Dillard described them were true, R. p. 58, even if the court believes all of that to be true, that the admission of such evidence at the trial serves to deprive the defendant of his right to counsel as guaranteed by the Fourteenth Amendment.

The main factual distinction between this case and Escobedo is that the defendant did not request a lawyer. The focus of the investigation was clearly on the defendant: he was the only suspect: a witness accused defendant of solicitation: he had been arrested and booked and was clearly ready for indictment. He made statements without the advice of a lawyer, statements which served to incriminate him, if believed, and which, when used at the trial level, aided in his conviction.

The issue here,is, should the fact that the accused in this case failed to request counsel warrant a disposition which differs from that reached by this court in Escobedo?

We contend that it should not.

Mr. Justice Black, speaking for the majority in *Gideon* v. *Wainwright* commented on *Powell* v. *Alabama*, "While the court at the close of the Powell opinion did by its language, as this court frequently does, limit its holdings to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable..."287 U.S. 45 (1932). We would apply the same reasoning to the *Escobedo* line of cases. Each case before this court is decided on its facts and the holding of a particular case is given with respect to these facts. But the policy behind the holding, the rationae of the opinion, is not so limited. A case not "on all fours" with a prior decision may yet be so far within the meaning and rationale of that opinion as to compel a similar disposition. The present case is one of this nature. The reason which led the court to decide Escobedo it did-- the constiutional concern for safe guarding the rights of the individual should lead the court to bring the present case within the purview of the Escobedo ruling.

Both reason and authority dictate this result.

1. Authority

Mr. Justice White, who dissented in Escobedo, would seem to agree that the right is not based on a request. "At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissable in evidence unless the accused has waived his right to counsel." 378 U.S. 483. It would appear then, that unless mere silence on the part of the accused may be construed as a waiver of the right to counsel, the present case is controlled by Escobedo.

In none of the cases discussed above the issue of waiver of the right directly before the court. However, the issue has been decided on other occasions and clear standard of waiver has been enunciated. To sustain the claim that counsel was waived, the accused must have been offered counsel but "intelligently and understandingly" rejected the offer. Carnley v. Cochran, 369 U.S. 506 (1962).

The California Supreme Court was very much aware of the artificial nature of requiring the defendant to request counsel in order for the right to attach. "We find no strength in an artificial requirement that defendant must specifically request counsel; the test must be substantiveone: whether or not the point of necessary protection for guidance of counsel has been reached." 394 P. 2d 956.

The persuasive influence of prior Supreme Court cases was determinative in Russo. After reviewing the right to counsel at other stages of the proceedings, the court concluded, we can percieve no sound basis for holding that a request for counsel is a prerequisite for the right to counsel at the interrogation stage while it is not at any other. The test of waiver is the same-- no matter what stage of the proceedings is at issue, so long as the right has attached. Russo v. New Jersey, 351 P. 2d 429, 437 (1962). "The police readily admit that the right to counsel attached prior to alleged making of the statement by defendant. They: hasten to tell the court that they advised him of this right but he didn't exercise it. Record at pages 41, 42, 57, and 69. The defendant insists that he did request counsel, and that for a time the police kept him incommunicado and told him he would get counsel when they would let him. R.p. 82, 83. The prosecution would leave this problem as to whether the defendant waived his right to the trier of fact. It becomes the police's word against the defendant. The policy of the right ____________ against such a procedure. Constitutional rights are not left to depend on the credibility of the litigants. They are absolute. The precedents cited above compel admissions of the type used here to be kept out of the courts unless the defendant was supported by counsel at the time of utterance.

2. Reason

Interrogation is not only a point of confrontation between the individual and the state, but is also a point of confrantation at which the defendant, especially if inexperienced, is incapable of handling himself...(T)he police process is the point at which the state enters; for ninety per cent of those ultimately convicted of a felony, it marks the only point of meaningful confrontation." Note, An Historical Argument for the Right to Counsel During Police Interrogation 73 Yale L.J. 1000,1053 (1964).

We are not dealing with the experienced criminal, sophisticated in his dealings with the criminal process; nor do we have one who benefits from the advantage of advanced education. Spiver Gordon is a civil rights organizer, a trouble-maker to the police, but not a person wise in the ways of police methods. Given as we have in the present case, an absence of sophistication in the fact of the legal complexities facing him (whether it be the knowledge of certain rights or the means available to enforce those rights) the accused is placed in an intolerable position if sophistication is to be the touchstone upon which those rights are grounded.

Additionally, "a person accused of crime needs a lawyer right afte r arrest probably more than at any other time." Chafee, Documents on Fundamental Human Rights, Pamphlet No. 2 at 541 (1951). Unless an accused is advised by counsel as to what to say, how much to say, and when to say it, the right to counsel at the subsequent trial becomes a mere formality, because the evidence presented to the triers of fact will be conclusive against the defendant. It was recognized in Escobedo tha t if a confession obtained after several hours of questioning a defendant without counsel is admitted in evidence, the trial may become "no more' than an appeal from the interrogation." at 487.

It is useful to conside the effect of a confession, in order to appreciate that the point at which a confession is obtained by the police is a critical stage of a proceeding. Substantially a confession is the same as a guilty plea. Therefore, the rights and safeguards surrounding the guilty plea should be applied to a confession.

When lawfully obtained, both a confession and a plea of guilty are conclusive. A guilty plea eliminates a trial; a confession that is not coerced often precedes a plea of guilty and pretty much decides an outcome of a trial, if not guilty is declared. Both the plea ~~of~~ and the confession must be entered voluntarily to be valid, and they are not considered voluntary if induced by a promise of leniency. If procurred by trickery or fraud, a plea can be withdrawn at any time, even after judgment. Lyons v. Goldstein, 290 N.Y. 19, 47 N.E. 2d 425., 4 N.YS. 2d 11 (1943); Hawk v. Olson, 326 U.S. 271 (1945). Similarly a case will be reversed if an involuntary confession was admitted, regardless of the weight of other evidence. As in the White case supra only the presence of counsel could allow an intelligent guilty ~~pa~~ plea. Here, only the presence of a counsel could allow an intelligent confession or admission, and the use of such statements gotten without this necessary constitutional requirement should void the conviction.

Only a waiver of this right to counsel could make such use of defendant's statement permissible. Waiver is generally defined as an "intentional or voluntary relingquishment of a known right." Black, Law Dictionary. One can make an intelligent waiver of a right only if he knows what the right is and that the right is his. The accused is in need of counsel to inform him of his rights. Often a defendant does not realize that an admission can be as ~~damg~~ damaging as a confession. The present case shows the truth of this statement. Due to Peacock's ______________ approach and defendant's ignorance of the importance of not admitting anything, defendant, according to Peacock's testimony, unwittingly admitted facts that supported Dillard's testimony, and which served to aid in his conviction. As defendant did not know of the totality of the right to stay silent and other constitutional rights, he was deceived into thinking this discussion would be beneficial to him. Such is not a waiver of this right and cannot serve to convict him.

Hence, use of this testimony violates defendant's right to a fair trial as it violates his right to counsel, and therefore, the conviction must be reversed.

I

The City Of Tallahassee May Not discriminate

~~Acts Generallly Lawful May Become Unlawful~~

Against And Segregate Plaintiff Because They Are Negroes

(A) The discriminatory context ~~of~~ in which the act of closing the swimming pools of Talahassee occurred ~~xxxxxxxxxx~~ renders that act in unconstitutional. Plaintiffs do not assert that it would be illegal under ~~any~~ all circumstances to close the public swimming facilities in Tallahassee. Under ~~some circumstances, closing these facilities would be necessary and legal~~. ~~Plaintiffs would not question the legality of~~ c the closing of the pools ~~in the face of drought, pollution or epidemic~~. ~~But~~ nevertheless it is a legal truism that:

> ...(A)cts generally lawful may become unlawful when done to accomplish an illegal end and a constitutional power cannot be used by way of condition to attain an unconstitutional result. Western Union Telegraph Company v. Foster, 247 U.S. 105, 38 S.Ct. 438, 439, 247 L.Ed. 1006 (1918) (Holmes, J.)

~~The legality or illegality of an act~~ whether or not an act is legal or not depends not only on the bare act itself, isolated from the context which gives it meaning, but on all the circumstances surrounding the act, ~~including~~ particularly the intended and actual result. Only ~~by considering the context of an act can a court deal with ------substance and not mere form~~. ~~Thus~~, In most contexts where would be nothing illegal in building a new school, ~~in~~ leasing a swimming pool or golf course, discharging a probationary employee or ~~in~~ closing a manufacturing plant. Yet each act has been held illegal when the context of the act ~~rendered the act~~ revealed an illegal purpose or result

Taylor v. Board of Education of City of New Rochelle, 191 F. Supp 181 (S.D.

Wyman v. Updegraff

N.Y. 1960) (enjoined building school for illegal purpose); Lawrence v. Hancock, 76 F. Supp. 1004 (D.C. S.D. West Va. 1948) (prohibited leasing of segregated swimming pool); Simkins v. City of Greensboro 149 F. Supp. 562 (1957) (prohibited leasing of goldf course); Textile Workers Union of America v. Darlington Manufacturing Company_____ U.S._____ ~~19~~x, 85 S.Ct. 994 (1965) (plant closed for discriminatory purpose ~~can~~ may be ordered reopened.)

?

~~Defendants right to close municipal swimming facilities is limited by the Constitution~~

Defendants assert ~~claim~~ their right to close these pools for a discriminatory unconstitutional purpose may not be challenged

It is ~~no answer for defendants to claim a right to do the act, to close municipal facilities at will.~~ Def~~endant's right~~, ~~like~~ But the legality of ~~their~~ this act muct be balanced ~~with duties and other rights~~ against the duties to uphold the constitution and cannot be ~~weighed~~ evaluated in a vacuum. When the context is unconstitutional a "right" no longer exists. Defendant's powers ~~over the swimming facilities~~, no matter how broad, can never transcend the limitations set by the Fourteenth Amendment. Limit~~s on~~ations on the powers to lease and sell public property have been explicitly defined in their constitutional context. ~~The courts have declared~~, For example, ~~that~~

> (T)he power to lease does not includd the power to discriminate against members of a minority race in the exercise of their constitutional rights nor can the City by such a lease ...relieve itself from its Constitutional obligation to afford to all its citizesn equal rights in the use of the public swimming pool which is the subject of the lease. Lawrence v. Hancock, supra, at 1008.

Nor does the power to sell "include the power to discriminate against members of any race." See, e.g., Tate v. Department of Conservation and Development, 133 F. Supp. 53 (E.D. Va. 1955) aff'd per curiam 231 F. 2d 615 (C.A. 4th 1956), cert denied 352 U.S. 838, 4 L.Ed. 2d 56, 77 S.Ct. 58.

In ~~the above cases~~, As in the case at bar, the above defendants ~~unquestionably~~ similarly possessed broad discretionary powers over the facilities involved, including the power to lease, sell, or close. ~~Under the law~~ Such decisions made therein were equally clear as a "function and responsibility of the elected public officials ~~and the officers and employees working under them.~~" (Lower Court opinion, p. 3). ~~The courts~~ In lease and sale cases the courts have simply pointed out that ~~no~~ no public official has the discretionary power to discriminate. ~~The~~ Similarly ~~same~~ this is true of the power to close. Such a power is no more absolute than the power to lease or sell, and may no more be urged in defense of violating the Constitution. Defendants claim in the court is not merely the right to close municipal swimming facilites (or any similar facility) at their discretion but to do so in deliberate defiance of the constitutional guarantees of plaintiffs ~~such with discriminatory and therefore unconstituional motive and effect~~. They ~~have not such right~~. Their responsibility is to uphold the Constitution, not ~~to~~ defy it. However subtle the technique,

~~Plaintiffs are asserting~~ Their Constitutional Right to be Free From Discrimination

~~The right~~ To be free from discrimination is the right plaintiffs urge upon this Court, ~~not a "right to swim" is at issue.~~ and not its right to swim, is plaintiffs' assertion. ~~Plainiffs could not and~~ They nor could plaintiffs do not, assert any absolute right to force the city of Tallahassee to build and operate swimming pools for the pleasure of plaintiffs. ~~They do, however, have~~

a right ~~in~~ which they now/ask ~~pray~~ this court to enforce. ~~It is the right to swim~~ But ~~in~~ the pools, now in existence ~~existing~~, ~~which were~~ closed solely in order to segregate ~~discriminate~~ ~~against them~~ plaintiffs and the members of the~~ir~~ class, should be directed to be reopened, so as to uphold equal protection of the law.

~~It is this right~~ , to be free from racial discrimination ~~which~~ is the ~~in~~ question -- not the ~~simply a~~ right to swim. ~~The former right is Constitutionalyy protectedted and does not depend upon the existence of the latter.~~ The Supreme Court has ~~applied~~ similar reasoning in analogous circumstances, the Supreme Court has said that while ~~For example~~, a man may have no "right" to government employeamnt, and ~~The~~ the Federal or state governments may fire a ~~man for cause or~~ probationary employee without cause, ~~but~~ once the discharge is professedly for a wrongful reason, then he must be clothed with Constitutional guarantees. ~~that man has the right to be secure against being fired for an illegal case.~~

(facts)

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that Constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. Wieman v. Updegraf 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 2d 216 (1952).

facts

See also Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1689, 6 L.Ed. 2d 982 ~~(1961) which~~

which reaffirms the Constitutional right not to be discriminated against

~~[illegible]~~

~~[illegible] protected right under the Constitution~~

~~independent~~ whether or not here is an independent right to participate

in the activity in which the discrimination occurs, i.e., whether the

~~[illegible]~~

Too much general talk - not enough facts

------right to the activity is a "protected right" under the Constitution. The right not to be discriminated against is a protected right and outweighs defendants right to close, whic h right is limited by the Consitution to acts of closing for purposes other than discrimination. In other terms, the act of closing can not transgrees or run afoul of the Constitution.

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A Major Effect Of this Discriminatory Act

~~The Discriminatery Effect of the Tallahassee Closing~~ is to Intimidate Plaintiffs And to Prevent them from Freely Exercising their Rights to Use Public Facilities on a Desegregated Basis.

And then close

Closing under ths circumstances of this case ~~creates a situation~~ presents Negroes with the dilemma wherein ~~the fear~~ of losing similar public facilities in entirety ~~may outweigh any desire of citizens, Negro residents like plaintiffs, to~~ if they attempt to exercise their right to use such facilities on a desegregated basis. ~~If the closing is not enjoined, the Negro resident would necessarily~~ be hesitant to ~~assert his right to use other facilities.~~ Citizens of the United States should not be placed in the position of causing all people in the community to lose the use of facilities should they assert their right to equality

Swimming facilities, parks, playgrounds and the like are not ~~a mere luxury but almost a necessity~~ have become the common pleasure of all in Tallahassee. ~~The public swimming pools operated by defendants were a frequently used source of relaxation and refreshme nt to all the residents of Tallahassee.~~ Their loss weighs heavily on both Negroes and Whites. But the weight of the loss is by no means equal. Aside from the obvious fact that Negroes can less well afford to construct private swimming pools, the greatest burden of the closing of the pools is that they are intimidated ~~[illegible]~~ ~~[illegible]~~ from further atteimpting to exercise their constitl rights to use public facilities on a nondiscriminatory basis. If defendants will go so far as to close a facility upon which all residents of Tallahassee are so dependent, what, all Negro residents must ask ehmesleves, would they not be willing to close rather than integrate.

In proportion as other facilities are needed and valued by Negroes, so will they be hesitant to risk their loss by attempting to enjoy their use on an integrated basis.

An illegal and unconstituional effect is created by the either/or situation presented here. City officials are saying without ~~privilege~~ right or the force of law: either accept public faicilites on a segregated basis or ~~accept no~~ risk having no facility at all. To implement the law of the land and grant plaintiffs their protected constitutional rights to use desegregated public facilities these officials must be deprived of the power to clsoe for a discriminatory purpose wh ich obviously succeeds in intimidating plainfiffs and other members of their class.

The Motive Of The Officials of Tallahassee Was Illegal And Unconstitutional

Although the City Manager closed the swimming pools without officially announcing any reasons, the only reasonable inference to be drawn from the (statement of) facts is that the sole motive was to deny plaintiffs and other Negro residents their Constitutional right under the 14th amendment and the Civil Rights ACt of 1964 to use the facility on an equal, desegregated basis. Any actions solely based upon a purpose to discriminate should and have been evaluated and condemned as illegal in light of that motive. See, e.g., Tate, Derrington, Simkins, (Prince Edward). The city of Tallahassee, desiring to maintain an unlawful pattern of segregation, closed the swimming pool system within hours of an attempt to integrate it, in order to punish plaintiffs and dissuade them from perhaps equally disastrous attempts to integrate other highly valued municipal facilities. The 14th amendment is clear: whatever the rights of private parties to base certain actions on discriminatory motives, representatives of the State are denied the privilege to have (or exercise) such purposes

Defendants' Act of Closing Is Unconstitutional and Enjoinable As an Expression of Their Discriminatory Motive

Purpose or motive colors (conditions) the (public) power to dispose of public property in operation for the benefit of the general public.

The requirements of the 14th amendment with respect to racial discriminatio

The requirements of the 14th amendment with respect to racial discrimination set limits to the official actions. For this reason, and since an act can be viewed in terms of motive as well as effect, the courts have adjudged the legality of leasing or selling public facilities in terms of the legality of the motive behind (determining) the acion. The importance of examining motive or purpose was stressed in Derrington v. Plummer, supra, where the court focused on whether the discriminatory acts of a private lessee could be deemed "State" action since the County was the lessor. In determining that the lessee's acts were discriminatory "state" actions it assumed that the ~~xx~~ County did not lease for a discriminatory purpose. However, the court clearly stated that whatever "private purpose" a county might have in leasing public property it could not have a purpose to discriminate.

> When there is no purpose of discrimination, no joinder by the County in the enterprise, or reservation of control by it, it may lease for private purposes.

The conclusion is obvious that a purpose to discriminate is enough for a court to prohibit a county from exercising an otherwise legitimate(inviolate) power to lease as well as to prohibit an already existing lessee from discriminating because of its relationship to the county-lessor.

The court's decision in Tate preventing the State from negotiating or acting upon a mere "intnet" to lease a public park to a yet undesignated private party logically followed the above reasoning. Therein the court explicitly stated that the sole purpose behind such a lease would be to continue discrimination on the basis of race. In its own word:

> It is perfectly apparent to that Court that the fundamental reason for the contemplated lease lies in the problems of use by members of all races... the proposed "negotiated lease" effectively vests in the hands of a small group the power to accomplish by indirection exactly what the courts have siad could not be done.

Simkins made the law clear concerning public power to lease public purpoerty that had to be operated on a nondiscriminatory basis. Such a power exercised for a discriminatory purpose was unconstitutional and enjoinable and any lessee was under a duty identical to that of public operators to operate the facilities on a desegregated basis, While the city- lessor was put under a duty to ensure that the lessee did not discriminate.

Official exercise of the power to lease has thus been rendered ineffective by the courts as a technique of denying to Negro residents the legal right to equal use of public facilities. However, such officials, and the defendants are examples, have continued to attempt to use other such techniques to perpetuate their policy of unconstitutional discrimination. The sale of public property and closing facilities are techniques inspired by the same motivation as the proscribed leasing.

Constitutional standards analogous to those devised in the lease cases should and have been applied in determining whether such ~~xxxx xx~~ powers to dispos~~ing~~ of property have been validly ~~xxxxxxxxx~~ used.

The standard of __bona fide__ public sale existe in the case of sale of a public facility formerly operated on a segregated basis. See __Tonkins__. supra In order to insure legally that the City of Greensboro could not sell because of an intent to discriminate the court there, required that the sale be held through open bidding at public auction. The ~~court did not come to a~~ no final adjudication of the ~~case~~ issue seeking to enjoin the sale but ~~held it over~~ the case turned on the for argument concerning whether or not the sale was __bond fide__. The fact that it did not grant pliantiffs their ~~asked for~~ sought after injuctive relief does not hurt plaintiffs in the instant case because the decision in __Tonkins__ turned on the fact that given the judges view of the evidence the sale was se donducted ~~so that~~ as to show __no intent__ to discriminate, ~~was indicated~~. A factual finding that a discriminatory motive colored the sale as indicated by less than bona fide dealings with potential Bidders would have led to a different holding.

Thus the courts have devised standards to judge the motive behind official exercise of ~~xx~~power to lease or sell public facilities, facilities which, if operated by the municipalities or counties, must be operated on a desgregated basis. If exercise of the power to close is viewed as another potentially discriminatory technique, then the court should apply constitutional standards to examine the motive for its exercise, standards analagous to those applied in the lease and sale case. If, as in the instant case, *the sole motive* for closing a facility is to deprive Negro residents of their Fourteenth Amendment rights and if the context indicates a~~n~~ motive to defy the Constitution and the Civil Rights Acts than the closing should not be condoned. If closing in such a context is viewed as a technique of discrimination as determined by the motive behind the action then it is an illegal action similar to the act of leasing with an intent to discriminate (*Simkins*) or selling under non *bona fide* conditions. (See second *Hampton* case.)

Hampton v. City of Jacksonville should be limited to its facts

If the facts of the case before the court are examined in the perspective requiring standards to test the illegality of the motive behind the exercise of municipal powers over property, permissible in the abstract, then *Hampton*--which seemed to hold that cleding could not be an act of discrimination in the same sense as leasing or selling under certain circumstances -- mue be limited to its facts. In that case perhaps the motive to discriminate through closing, so analogous to the lease and sale cases, was not as clearly before the court. Therein, the focus of argument was upon contempt of court and the lack of discriminatory effect as well as the fear of public disturbance as a possible motive. Herein, the only "fear" could have been with the clarity of the constitutional duty imposed upon public officials to operate on a desegregated basis reemphasized by the fact that the Tallahassee closing occured two days after passage of the Civil Rights Act of 1964. There is no argument here, as in *Hampton*, initially, over whetcher a Declaratory Judgment should issue ordering public official s to desegregate. Thus a closing under the circumstances before the court motivated by such a clear desire to defy the law of the land is as illegal as an illegal lease or sale intended to avoid the duty to desegregate.

The importance of a discriminatory motive as a basis and standard to examine the constitutionality of xxx official action was stressed in Prince Edward.

> But the record in the present case could not be clearer that Prince Edward's public shools were closed ...for one reason and one reason only: to ensure, thrugh measures taken by the the county and the Satate, that White and Colored choldren in Prince Edward county would not, *under any circumstances* go to the same school. Whatever non racial grounds might support allowing a city to abandon public schools, *the object must be a Constituional one* ~~n~~,and grounds of race and opposition to desegregation do not qualify as Constituional. 1233 (emphasis supplied).

That the closing of Prince Edwards schools was enjoined on other grounds nonexistent here does not change the crucial perspective quoted above: that in disposing of municipal faciliteis "the object must be a constituional one, and grounds of race and opposition to desegregation do not qualify as Constituional."

The Motive to Continue to Discriminate in Defiance of the Law Through Closing Facilities Has Been Condemmed in the Education Cases

An examination of litigation ivolving desegregation in public educational facilities subsequent to the Brown deicision prallels with tragic exactness litigation over the right to use public facilities on a desegregated basis. The motive of State and city school official were to defy the law of the land ~~thxx~~ and their techniques expressed their motive whether the ability to act was empowered by statute, custom, or mere caprice -- to lease or sell to private operators or to close. These acts were enjoined, see e.g., Bush, Lee, Prince Edward, leaving one alternative -- lawful desegregation. Thus in asking the court to invalidate the act of closing here, based in an illegal motive, Plaintiffs are requesting a vindication of rights for [illegible] reasons ~~already~~

argued and accepted in a somewhat similar way in the education cases.

The Court has the Power to Declare that the Closing is Unconstitutional and to Order the City to Reopen the Pools

Defendants brief and the opinion below cite a line of cases supposedly determinative of the issue in defendants favor: Hampton, Montgomery, Tonkins, Clark v. Flory.

These cases are to some extent distinguished ante ~~above~~ from the case at bar, supra

More importantly, ~~thx~~ if with respect to a swimming pool closing Gilmore ~~ixx~~ was controlling in the fifth ciricuit at the time of the Jacksonville opinion, it must now be noticed that the extent of a district courts' power to issue injucitions was not as clearly defined as at present. Since Gilmore , the Supreme Court has decided two major cases indicating both the power of a federal court to order the reopening of a facility and giving some of the circumstances when the court should exercise that power. An implication that can be drawn from these decisions, infra, is that the lower courts in ~~[illegible]~~ respecting the ~~judicial~~ policy of judicial restraint, may have erred on the side of permitting wrongs to go unredressed because they may have thought the judiciary lacked the power to act with respect to municipal closings. These 3 ~~two~~ cases are Prince Edward ~~and~~ Darlington. Wilma

Prince Edward ordered a county to repen its public schools after they had been closed and ~~pri~~ "private" schools had been set up as substitutes, at least for white children. (not sure what to say here.)

Darlington Mills casts useful if not controlling light on the dubject of a court's powers to order the reopening of a facilitliy closed for illegal reasons and with illegal effects. It holds that a court may order the opening of a facility ~~xxx~~ when the motive and effect of the closing was to discriminate through intimidation. The Supreme Court thus said in Darlington that a federal court equity power extends to ordering a private corporation to reopen a plant when it was closed with the purpose and effect of depriving employees of a right to organize for collective bargaining purpsooes under a statute. Darlington is factually distinguishable from the case at bar, but only in ways which indicate that the holding in Darlington applies a fortiori to the present case.

Defendants herein are public officials not a private corporation. They have public duties far beyond those of a private corportaion, including a duty to uphold the U.S. Constiution, promised under oath (Art VI, 2 an d 3) and rights as a public enterprise that may be less potent against personal rights than the rights of a private entrepreneur.
Plaintiffs assert not a mere statutory right, though the intent of Congress has been clearly expressed in the Civil Rights Act of 1964 and other statutes, but a Constitutional right under the 14th Amendment. The equity power of a court to issue whatever order is necessary to remedy a violation

of the Consitution is at the very least as great as the equity power of a court to issue whatever order is necessary to remedy the violation of a prohibiition against discrimination that leaves undefined judicial power in a statute. In this case as in Darlington we are concerned with the inherent equity power of the federal courts, and the Supreme Court has said it can n e used to enjoin illegal acts of the order of closing a facility with an intent to discriminate andqwith a discriminatory effect emen though the statute or the Constitoution daes not explicate the courts power to so act.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

ROCHELLE STEELE, et al.,	
Appellants,	Civ. Case 1073-65
v.	
GEORGE B. TAFT, et al.,	
appellees.	

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

On May 21, 1965 appellants filed a complaint charging appellees, officials of the City of Tallahassee, with deliberately closing three swimming pools on July 4, 1964 rather than permitting Negroes to swim in the two pools which had previously admitted only white people. Appellants sought an order directing the City of Tallahassee to reopen and operate the three swimming pools on a desegregated basis. Choosing not to contest appellants' averments, appellees moved to dismiss the complaint for failure to state a cause of action. The court heard argument on defendant's motion to dismiss, and on appellants' motion for a preliminary injunction , the motion to dismiss was granted (see Appendix A below). In its opinion the court below indicated the foolishness of the defendants' acts, but granted the motion on the theory that the Federal Court had no power to order the reopening of the pools. Appellants now appeal to this court from the order granting the motion to dismiss and denying appellants the preliminary relief sought.

STATEMENT OF FACTS

On the afternoon of July4, 1964, two days after the President of the United States signed into law the Civil Rights Act of 1964 containing Title III, expressing the right of all persons to equal use of all public facilities, Appellants,citizens of the United States and Negro residents of Tallahassee, Florida, attempted to exercise their rights to equal utilization of the publicly owned Tallahassee swimming pools. They sought admission to the "all white" Levy Park pools. Admission was illegally denied because of appellants' race. Without prior warning or justification, the City Manager of Tallassee, that afternoon, ordered all three municipal swimming pools closed (two white and one Negro). This act expressed an effort to intimidate appellants and others similarly situated into accepting a segregated system, thereby restraining them from excercising their right to equal protection of the laws andthe right to petition redress from illegal and unconstitutional governmental conduct.

POINT I

SINCE THE ACTS OF THE DEFENDANT WERE PERFORMED IN ORDER TO DENY PLAINTIFFS CONSTITUTIONAL AND STATUTORY RIGHTS THE COURT BELOW SHOULD HAVE ORDERED THE RE-OPENING OF THE POOLS.

Although the City of Tallahassee was under no obligation to operate swimming facilities, and presumably could close municipal pools "for any reason or for no reason," (United States v. Board of Education of Green County, Miss., 332 F2d 40 (5th Cir., 1964), it could be prevented from doing so for an illegal or unconstitutional reason. Haynes v. Thomas 232 F2d 688 (D.C. Cir., 1956)

It is well recognized that:

> "... (A)cts generally lawful may become unlawful when done to accomplish an illigal end and a consittutional power can not be used by way of condition to attain an unconstitutional result." Western Union Telegraph Co. v. Foster, 247 U.S. 105, 38 Sct. 438, 439 247 L.Ed. 1006 (1918) (Holmes,J.) See also: Aikens v. Wisconsin, 195 U.S. 194, 206 (1904); United States v. Reading Co., 226 U.S. 324 (1912).

Not being the legitimate exercise of a discretionary function, the act of closing the pools was a misuse of a power "generally lawful" in order to prevent the exercise of rights protected by statute as well as by the constitution. This was brought into sharp focus recently in the case of Habib v. Edwards, 34 LW 2242, 2243, (Dist. Col Gen. Sess. Civ.. Div., 10/29/65) in which the court said:

"That kind of distinction -- between action which ispermitted

> when done for a lawful purpose but prohibited when done for an unlawful or impermissible purpose -- is not at all unusual. Thellabor laws for example, which permit the firing of employees for legitimate reasons, preclude their discharge for (and even a refusal to hire) on account of labor union activity. Similarly the civil rights statutes prohibit the imposition of economic sanctions for the purpose of intimidation in connection with the exercise of the right to vote in federal elections, but they do not interfere with legitimate economic pursuits. In all such matters, the courts and the administrative agencies concerned have found little difficulty in distinguishing between the permissible and the impermissible."

A. The City's Purposes In Closing The Swimming Pools Were The Violation of The "Equal Protection" Clause of The 14th Amendment Title III of the Civil Rights Act of 1964, and The Public Policy of The United States As Expressed Therein.

Because the District Court granted appellees' motion to dismiss as it did, appelants' uncontradicted allegations for the purpose herein must be taken as true. At this stage of the proceedings no question exists that the closing of the Tallahassee swimming pools was:

> "...solely for the purpose of depriving the plaintiffs and the class they represent as aforesaid; of equal rights and equal protection of the laws and privileges and immunities that the object of the closing of the pools was not a Constitutional one but was done purposely and deliberately on the grounds of race and opposition to desegregation ..." (Complaint, XVIII.)

In addition, the sequence of events in itself indicates the validity of the allegation. The closing of the two "whites only" pools as well as the pool for Negros, within hours after an attempt by Negroes to use one of the "white" pools would undeniably be strong evidence of a descriminating intent. That these events occured two days after the passage of the Civil Rights Act of 1964 (which contains statutory provision for redress against the discriminatory denial of access to public facilities) should be conclusive. In his opinion, Judge Carswell treated this allegation as fact not merely as undenied pleading.

Often courts have seen fit to prevent the performance of an otherwise valid discretionary act, because the government agencies performing the act have sought to further a pattern of discrimination. *Tate* v. *State Department of Conservation and Development*, 133 F.Supp. 53 (E.D. Va., 1955), aff'd per curiam, 231 F2d 615 (4th Cir., 1956), cert. denied, 352 U.S. 838, 4 (Ed 2d 56, 77 Sct. 58, (invalidating sale of public land to continue discrimination); *Lawrence* v. *Hancock*,76 F. Supp. 1004 (D.C.S.D. West V., 1948)(Prohibited leasing of swimming pool,because it was a technique for avoiding desegregation.); *Simkins* v. *City of Greensboro*, 149 F. Supp. 562, *aff'd* 246 F2d 425 (prohibited leasing of public golf course if used to avoid integration and required lessor - city - to supervise private lessee). *Hampton* v. *City of Jacksonville*, 304 F2d 320 (invalidating sale of golf course)). In each of these cases, a government agency actec to prevent the operation of a public facility on a non-discriminatory basis, In each case it was prevented from evading by a federal court.

In this case, the closing of the swimming pools was bold and direct contradiction to the ends which the Civil Rights Act of 1964 sought to effect. Courts have prevented the destruction of public policy established by the legislature act. *Wieman* v. *Updegraff*, 344 U.S. 183 (1952) (denial of pay to public employees in violation of legislatively established procedures was wrongful); *United States* v. *Board of Education of Green County*, 332 F2d 40 (5th Cir.,

1964) (refusal to renew teacher's license was wrongful, because of intent to interfere with rights under the "voting rights" provisions of 1964).

Since the acts of defendants constituted an effort to interfere with the rights of appelants under the Civil Rights Act of 1964 and the "Equal Protection Clause" of the 14th Amendment,the court below to uphold the validity of the Constitution and the law should have granted the relief sought. To do this would be to concede an inability to cope with a flagrant disa vowal of the duty of the public official to obey the laws.That this may may cost something to the city should be a serious obstacle to the relief sought. When a garbage truck driver negligently harms a pedestrian, it may cost the city far more than the cost here, and courts frequently enter such judgements. Such judgments affect the budget no more than the relief asked for here..

B. The Purpose of the Closing Was Also To Coerce And Intimidate Negroes To Accept Segregated Public Facilities And To Restrain Them From Excercising Their Constitutional Right To Petition For Compliance With The Civil Rights Act Of 1964 And The Fourteenth Amendment.

In Tavver v. G. and C. Construction Co., (U.S. D.C., S.D.N.Y., unreported case,), and again in Habib v. Edwards, supra, Federal Courts prevented landlords from evicting tenants who exercised their right to complain about building violations to established government agencies. In both cases the tenants could have been evicted for "any reason or no reason." In neither case did statutes protect either a right to a continuation of their tenancies or a right to complain about the condition of the premises. To prevent intimidation of petitioners however by performance of otherwise lawful acts done with the intent of interfering with the petitioners excercise of the right to seek a redress of grievances. In the present case appellants sought to exercise their rights protected by the constitution and statute and to petition for a recress of grievances arising from discrimination. The retaliatory response of the city government of Tallahassee was punitive and intimidatory. It punishedaappellants for petitioning for a redress of grievances by closing facilities operated exclusively for Negroes, and it attempted to intimidate them into refraining from exercising their rights in the future. The threat that "Negro" facilities would be closed if future attempts were made to integrate "white" facilities was implicit in the closing.

Indeed, in several cases otherwise lawful sanctions were deemed wrongful when perpetuated with the *intent to intimidate* persons from exercising their constitutional or statutory rights. *U.S.* v. *Bruce*, 34 LW 2278 (C. A. 5, 11/16/65) (restraining voter registration organizer from entering private property was wrongful when intended to intimidate Negroes fro the purpose of interfering with their right to vote); *United States* v. *Beatty*, 288 F.2d 653 (6 C.R., 1961) (eviction of sharecroppers); *United States* v. *Board of Education of Green County Miss.*, supra, (refusal to renew a teacher's contract).

In all of the cases cited, the acts were discretionary, but when they were done for the purpose of intimidating people into refraining from the exercise of their right to petition or statutory right, they were voided or prevented.

C. The Cases Cited By The Court Below Were Improperly Relied Upon.

The District Court relied upon *Tonkins* v. *City of Greensbore*, North Carolina, 162 F. Supp. 549; City of Montgomery, Alabama v. Gilmore, 277 F.2d 364 (5th Cir.); Hampton v. City of Jacksonville, Florida, 304 F.2d 319 (5th Cir.); and Clark v. Flory 237 F.2d 597 (4th Cir.). Each is distinguishable as to questions of fact and law from the instant case and none reaches the crucial issue here: whether city officials have the power to close these swimming pools solely for a discriminatory purpose and whether the federal court has the power to order them to reopen these facilities.

Tonkins v. City of Greensboro, North Carolina

The first opinion of the District Court in Tonkins considered and decided two issues: (1) whether defendants could maintain a segregated swimming pool, and (2) if not, whether selling the pool would be an unconstitutional evasion of the obligation to operate on an equal basis. The first issue was decided for plaintiffs. The second was decided for the defendants but not as an issue of law but rather on the basis of a finding of fact that the sale was "bona fide." In no way did the court grant a license to the city to sell as a technique of avoiding its constitutional obligations. In the case before us Judge Carswell has given a "license" to Tallahassee or to any community to close an open facility in order to deny Negroes the right to use that facility.

City of Montgomery, Alabama v. Gilmore

Montgomery closed its parks pursuant to its resolution stating that there were "grave problems involving the welfare and public safety of the City of Montgomery." This was the factual context under which the court refused to review the judgment and discretion of the commissioners. Public order was in a crisis state. In that case no one challenged this finding and for the purposes of this case it it must be taken as true. No such state of facts is apparent in our case. Nothing but the right of Tallahassee to defy the Constitution is at issue; here appellees, under the pleading, admit the improper reason for closing the pools; no official discretion in behalf of the "best interests" of the city has ever been asserted. A bold and arbitrary use of official power for the sole purpose of discriminating against appellants and members of their race confronts and challenges not only appellants but also the courts.

Hampton v. City of Jacksonville, Florida

Jacksonville closed its pool after a declaratory judgment and a preliminary injunction had been issued enjoining the city from maintaining segregated swimming pools..Thereafter Jacksonville closed the pools. A ruling was sought that defendants be held in contempt of the declaratory judgment which contained no direction not to close the pools. Without opinion, the District Court denied plaintiffs' motion. On appeal, this Court merely decided that there was no error in the order of the District Court; no consideration by this Court was expressed as to the issue of closing as a technique to thwart the Constitution. Whether the court should punish public officials for contempt of a judgment containing no direction to defendants to remain open was the issue in the contempt proceeding. References by the District Court there of the right of the city to close were merely incidental to the issue concerning contempt. The refusal to punish for contempt was the subject before this Court on that appeal. Thus the issue presented on appeal in the case currently before this Court did not reach this Court in City of Jacksonville.

Clark v. Flory

A declaratory judgment concerning desegregation of the city's parks was requested; the relief requested did not seek a reopening of the facility; and the court condluded, per curiam, that the issue of desegregation became moot because the parks had already been closed. Closing the parks as an unconstitutional act was never considered; nor was the power to order reopening an issue before the court. In fact, in that case, unlike the present case, no one contended that the court had the power to require the State of South Carolina to operate any park. In other words, the parties eliminated the issue. What is more, the court decided that the proper party, the State Forestry Commission, was not before the court; that plaintiffs were warned about this and did not cure the defect, and therefore a declaratory judgment would be futile. Thus the wrong parties and the wrong issues were before the court.

POINT II

THE COURT HAS THE POWER TO DECLARE THAT THE CLOSING IS UNCONSTITUTIONAL AND TO ORDER THE CITY TO REOPEN THE POOLS.

For the reasons set forth below we urge that this Court hass the power to order the officials of the City of Tallhassee to reopen the pools.

That there is ample precedent in the important cases set forth below illustrating the authority of this Court to effectuate, in some cases, even greater affirmative relief than is sought here, is quite clear. Where it is necessary to effectuate an important public concern and where one of the other organs of government or large private interest refuses or fails to do its duty, the federal courts have acted.

Haynes v. Thomas, 232 F.2d 688 (D.C. Cir., 1956)

In Haynes the federal government itself was ordered to reinstate a probationary employee. Concededly in that case the government could have discharged the employee for no reason at all, but once it discharged him for an alleged "security" reason it had to follow proper procedures even though nothing in the law as stated required this result.

Griffen v. County School Board of Prince Edward County, 377 U.S. 218, 84 S.Ct. 1126, 12 L.Ed. 2d 256 (1964)

This case illustrated the power of the court to effectuate affirmative relief when an act is done with an improper motive. In this landmark case the power of the federal courts to order school reopening was excercised against the county.

Baker v. Carr, 369 U.S. 186 (1962)

Here the federal courts were not loath, at great expense to the state, to set in motion changes in state voting procedures to accomplish constitutional results where the states had neglected the same to the effect of denying equal protection of the laws to many of its citizens.

This Court should not hesitate to grant the relief sought both to protect appelants' Fourtheenth Amendmant rights and to discourage appellees and others who would assert their right to exploit their governmental functions as a means of denying any group of American citizens their constitutional rights.

Textile Workers of America v. Darlington Manufacturing Company, 380 U.S. 263, 85 S.Ct. 994 (1965).

In some respects, Darlington indicates even more strongly the power of federal courts to grant the relief sought herin by appellants. It also suggests one of the situations where that relief is appropriate. Darlington is a case arising under the NLRA. Defendants owned several plants, in one of which employees sought to organize for collective bargaining. Defendants closed the plant in question shortly after the employees voted in favor of unionization. The Supreme Court remanded to the NLRB for a factual determination, with the instruction that if it were found that the purpose and effect of this closing was to intimidate workers in other plants of the company from exercising their right to organize collectively, then defendants should be ordered to reopen the plant. The Court knew reopening would involve huge expenditures of money, as well as the seriious question of the right of a businesss to close or to partly close its doors.

While Darlington presents a different area of law from the case at bar, the import of the holding bears directly on the present case. Appellees herein are public officials, not a private corporation. They have duties far beyond those of a private corporation, including a duty to uphold the United States Constitution promised under oath (Article VI, clauses 2and 3). As a public enterprise, Tallahassee has a greater duty to uphold individual rights than does a private entrepreneur. Appellants assert not a mere statutory right, as in Darlington, but a constututional right under the Fourteenth Amendment. It is thus not significant that Darlington was an NLRB case, under the Labor Act. That act (section 883, 8(a)(3), see Appendix B) prohibits employer discrimination but does not specify the types of action the Board or the courts on review may take to remedy a discriminatory situation. However, without such specification, the Court claimed the power to order a reopening of a plant after a discriminatory closing.

Similarly, although the Constitution does not specify reopening a discriminatorily closed pool as a form of relief against the infringement of civil rights such as the injury suffered by appellants herein, the federal courts do have inherent equitable power to issue an order directing the reopening of the pools so as to give substance to appellants' abstract right to equal protection and nondiscrimination.

CONCLUSING

We respectfully urge that the order dismissing the complaint be reversed, and that the District Court be directed to order appellees to reopen the swimming pools previously closed by appellees.

Respectfully submitted,

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Stephen M. Nagler, Esq.

Tallahassee

UNITED STATES COURT OF APPEAL
FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

ROCHELLE STEELE, et al.
Plaintiffs
vs.
GEORGE B. TAFT, et al.
Defendants

DISTRICT COURT
CIVIL CAUSE NO. 1073

APPELLATE COURT
CIVIL CAUSE NO. _______

MOTION TO EXPEDITE HEARING ON APPEAL AND ORAL ARGUMENT

Please take notice that Plaintiffs-appellants, by their undersigned attorney, hereby move this honorable Court to advance the above-titled case on the docket, and to hear their appeal from an adverse judgment of the District Court for the Northern District of Florida at the earliest possible time.

As is shown by the annexed affidavit of John D. Due, Jr., Esq., attorney for Plaintiffs, the harm which Plaintiffs and their class have suffered and continue to suffer is irreparable and will continue unless this appeal is promptly heard and determined. Plaintiffs further request oral argument of this appeal.

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Tallahassee, Florida

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UNITED STATES COURT OF APPEAL
FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

AFFIDAVIT

John D. Due, Jr., being first duly sworn, disposes and says that:

1. I, John D. Due, an one of the attorneys for plaintiffs in the action of Steele et al. vs. Taft et al., Civil Action #1073 in the United States District Court for the Northern District of Florida, and am familiar with the facts in the case.

2. The complaint was filed on May 21, 1965. It sought injunctive relief against the city of Tallahassee and some of its officers to restrain them from keeping the public swimming pools of the city closed.

3. The complaint alleges in substance: that the city's three swimming pools were constructed, supported or maintained by public funds; that their operation is essential for the health, education, safety, and welfare of the citizens of Tallahassee; that prior to July 4, 1964 the pools were operated on a segregated basis; that on or about July 4, 1964 a group of Negroes attempted to utilize the city's "white" pool and were refused entrance; that on the same afternoon the city manager ordered that the pools be closed; that this order was given for the sole purpose of denying plaintiffs and the other Negro citizens of Tallahassee the right to integrated and equal public facilities; that the purpose of closing the pools was to enforce segregation against plaintiffs and their class both directly by depriving them of access to the public pools, and indirectly by threatening them with similar closings should Negroes attempt to use other "white" public facilities.

4. The allegations of plaintiffs' complaint were not denied by the defendants. The defendants instead filed several motions to dismiss

on the grounds that the complaint had failed to state a claim upon which relief could be granted. In addition, defendants George Taft, James Hadaway, and D. Mack Humphrey moved that the case be dismissed as to them because of insufficiency of service on them.

5. Plaintiffs moved for a preliminary injunction alleging that irreparable damage was being done and would continue to be done to plaintiffs as long as the pools should remain closed.

6. Judge Carswell, upon plaintiffs' petition for an immediate hearing, listened to arguments on both motions on July 16, 1965, but ruled only on the motion to dismiss. He entered an order on that date granting defendants' motion to dismiss for failure to state a claim, and dismissing the action. It is from that order that Plaintiffs appeal.

7. In being denied access to these public facilities, plaintiffs and their class are suffering continued damage which is irreparable. There are no other facilities which are safe and practically available to plaintiffs and their class. The pools are essential to the health and welfare of the citizenry of Tallahassee, and the Negro citizens have no means available to them to compensate for the loss of these facilities. Should a hearing on this appeal be delayed until the fall when the children of Tallahassee are in school, the city will have effectively succeeded in its attempts to avoid integration of public facilities for another year.

United States Court of Appeals

Fifth Circuit

Civ. Case 1073—65

ROCHELLE STEELE, *et al.*,
Appellants,

v.

GEORGE B. TAFT, *et al.*,
Appellees.

BRIEF OF APPELLANTS

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United States Court of Appeals

Fifth Circuit

Civ. Case 1073—65

◆

Rochelle Steele, *et al.*,

Appellants.

v.

George B. Taft, *et al.*,

Appellees.

◆

BRIEF OF APPELLANTS

Statement of the Case

On May 21, 1965 appellants filed a complaint (R. 1-10) charging appellees, officials of the City of Tallahassee, with deliberately closing three swimming pools on July 4, 1964 rather than permitting Negroes to swim in the two pools which had previously admitted only white people. Appellants sought an order directing the City of Tallahassee to reopen and operate the three swimming pools on a desegregated basis. Choosing not to contest appellants' averments, appellees moved to dismiss the complaint for failure to state a cause of action (R. 11-13). The Court heard argument (R. 24-61) on appellees' motion to dismiss, and on appellants' motion for a preliminary injuction (R. 14). The motion to dismiss was granted (R. 15-17). In its opinion the Court below recognized that appellees' acts seemed "tragically absurd" (R. 17), but granted the motion to dismiss on the theory that the Federal Court had no power to order the reopening of the pools (R. 16). Appellants now appeal to this Court from the order granting the motion to dismiss and denying appellants the preliminary relief sought.

Statement of Facts

On the afternoon of July 4, 1964, two days after the President of the United States signed into law the Civil Rights Act of 1964 containing Title III, expressing the right of all persons to equal use of all public facilities, appellants, citizens of the United States and Negro residents of Tallahassee, Florida, attempted to exercise their rights to equal utilization of the publicly owned Tallahassee swimming pools. They sought admission to the "all white" Levy Park pool. Admission was illegally denied because of appellants' race (R. 7, 8). Without prior warning or justification, the City Manager of Tallahassee, that afternoon, ordered all three municipal swimming pools (two white and one Negro) closed (R. 8). This act expressed an effort to intimidate appellants and others similarly situated into accepting a segregated system, thereby restraining them from exercising their right to equal protection of the laws and the right to petition for redress from illegal and unconstitutional governmental conduct (R. 8, 9).

POINT I

Since the Acts of the Defendants-Appellees' Were Performed in Order to Deny Plaintiffs-Appellants' Constitutional and Statutory Rights the Court Below Should Have Ordered the Reopening of the Pools.

Although the City of Tallahassee was under no obligation to operate swimming facilities, and presumably could close municipal pools "for any reason or for no reason" (*United States* v. *Board of Education of Green County, Miss.*, 332 F2d 40 (5th Cir., 1964), it could be prevented from doing so for an illegal or unconstitutional reason. *Haynes* v. *Thomas*, 232 F2d 688 (D. C. Cir., 1956).

It is well recognized that:

> ". . . (A)cts generally lawful may become unlawful when done to accomplish an illegal end and a constitutional power can not be used by way of condition to attain an unconstitutional result." *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 38 SCt. 438, 439, 247 L. Ed. 1006 (1918) (Holmes, J.). See also: *Aikens* v. *Wisconsin*, 195 U. S. 194, 206 (1904); *United States* v. *Reading Co.*, 226 U. S. 324 (1912).

Not being the legitimate exercise of a discretionary function, the act of closing the pools was a misuse of a power "generally lawful" in order to prevent the exercise of rights protected by statute as well as by the constitution. This was brought into sharp focus recently in the case of *Habib* v. *Edwards*, 34 LW 2242, 2243 (Dist. Col Gen. Sess. Civ. Div., 10/29/65), in which the Court said:

> "That kind of distinction—between action which is permitted when done for a lawful purpose but prohibited when done for an unlawful or impermissible purpose—is not at all unusual. The labor laws for example, which permit the firing of employees for legitimate reasons, preclude their discharge for (and even a refusal to hire) on account of labor union activity. Similarly the civil rights statutes prohibit the imposition of economic sanctions for the purpose of intimidation in connection with the exercise of the right to vote in federal elections, but they do not interfere with legitimate economic pursuits. In all such matters, the courts and the administrative agencies concerned have found little difficulty in distinguishing between the permissible and the impermissible."

A. The City's Purposes in Closing the Swimming Pools Were the Violation of the "Equal Protection" Clause of the 14th Amendment, Title III of the Civil Rights Act of 1964, and the Public Policy of the United States as Expressed Therein.

Because the District Court granted appellees' motion to dismiss as it did, appellants' uncontradicted allegations for the purpose herein must be taken as true. At this stage of the proceedings no question exists that the closing of the Tallahassee swimming pools was:

> ". . . solely for the purpose of depriving the plaintiffs and the class they represent as aforesaid; of equal rights and equal protection of the laws and privileges and immunities that the object of the closing of the pools was not a Constitutional one but was done purposely and deliberately on the grounds of race and opposition to desegregation . . ." (Complaint, XVIII at R. 9)

In addition, the sequence of events in itself indicates the validity of the allegation. The closing of the two "whites only" pools as well as the pool for Negroes, within hours after an attempt by Negroes to use one of the "white" pools would undeniably be strong evidence of an intent to discriminate. That these events occurred two days after the passage of the Civil Rights Act of 1964 (which contains statutory provision for redress against the discriminatory denial of access to public facilities) should be conclusive. In his opinion, Judge Carswell treated this allegation as fact not merely as undenied pleading (R. 17, 49).

Courts have often seen fit to prevent the performance of an otherwise valid discretionary act, because the government agencies performing the act have sought to further a pattern of discrimination. *Tate v. State Department of Conservation and Development*, 133 F. Supp. 53 (E. D. Va., 1955), aff'd *per curiam*, 231 F2d 615 (4th Cir., 1956), cert. denied, 352 U. S. 838, 4 (Ed. 2d 56, 77 Sct. 58 (invalidating sale of public land to continue discrimination); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (D. C. S. D. West V., 1948) (Prohibited leasing of swimming pool, because it was a technique for avoiding desegregation); *Simkins* v. *City of Greensboro*, 149 F. Supp. 562, *aff'd* 246 F2d 425 (prohibited leasing of public golf course if used to avoid integration and required lessor—city—to supervise private lessee). *Hampton* v. *City of Jacksonville*, 304 F2d 320 (invalidating sale of golf course). In each of these cases, a government agency acted to prevent the operation of a public facility on a non-discriminatory basis. In each case evasion was prevented by a federal court.

In this case, the closing of the swimming pools was a bold and direct contradiction of the ends which the Civil Rights Act of 1964 sought to effect. Courts have prevented the destruction of public policy established by a legislative act. *Wieman* v. *Updegraff*, 344 U. S. 183 (1952) (denial of pay to public employees in violation of legislatively established procedures was wrongful); *United States* v. *Board of Education of Green County*, 332 F2d 40 (5th Cir., 1964) (refusal to renew teacher's license was wrongful, because of intent to interfere with rights under the "voting rights" provisions of the Civil Rights Act of 1964).

Since the acts of defendants constituted an effort to interfere with the rights of appellants under the Civil Rights Act of 1964 and the "Equal Protection Clause" of the 14th Amendment, the Court below to uphold the validity of the Constitution and the law should have granted the relief sought. Failure to do this is to concede an inability to cope with a flagrant disavowal of the duty of the public official to obey the laws. That this may cost something to the city should not be a serious obstacle to the relief sought. When a municipally owned vehicle negligently injures a pedestrian, the city may be put to much greater expense than the cost of reopening the pools in the case, yet courts frequently enter such judgments against municipalities. Furthermore such judgments affect the budget neither more nor less than the relief sought here.

B. The Purpose of the Closing Was Also to Coerce and Intimidate Negroes to Accept Segregated Public Facilities and to Restrain Them From Exercising Their Constitutional Right to Petition for Compliance with the Civil Rights Act of 1964 and the Fourteenth Amendment.

In *Tarver* v. *G. and C. Construction Co.* (U. S. D. C., S. D. N. Y., unreported case, 1964), and again in *Habib* v. *Edwards, supra,* Federal Courts prevented landlords from evicting tenants who exercised their right to complain about building violations to established government agencies. In both cases the tenants could have been evicted for "any reason or no reason." In neither case did statutes protect either a right to a continuation of their tenancies or a right to complain about the condition of the premises. In both cases, however, federal courts acted to prevent intimidation of petitioners by performance of otherwise lawful acts done with the intent of interfering with the petitioners' exercise of the rights to seek a redress of grievances. In the present case appellants sought to exercise their rights protected by the constitution and statutes of the United States and to petition for a redress of grievances arising from discrimination. The retaliatory response of the city government of Tallahassee was punitive and intimidatory. It punished appellants for petitioning for a redress of grievances by closing facilities operated exclusively for Negroes, and it attempted to intimidate them into refraining from exercising their rights in the future. The threat that "Negro" facilities would be closed if future attempts were made to integrate "white" facilities was implicit in the closing.

Indeed, in several other cases otherwise lawful sanctions were deemed wrongful when perpetrated with the *intent to intimidate* persons from exercising their constitutional or statutory rights. *U. S.* v. *Bruce*, 34 LW 2278 (C. A. 5, 11/16/65) (restraining voter registration organizer from entering private property was wrongful when intended to intimidate Negroes for the purpose of interfering with their right to vote); *United States* v. ***Beatty,*** **288 F. 2d 653** (6 C. R., 1961) (eviction of sharecroppers); ***United States*** v. *Board of Education of Green County Miss., supra* (refusal to renew a teacher's contract).

In all of the cases cited, the acts were discretionary, but when they were done for the purpose of intimidating people into refraining from the exercise of their First Amendment right to petition or statutory right, they were voided or otherwise prevented.

C. The Cases Cited by the Court Below Were Improperly Relied Upon.

The District Court relied upon ***Tonkins*** v. ***City of Greensboro, North Carolina,*** 162 F. Supp. 549; ***City of Montgomery, Alabama*** v. ***Gilmore,*** 277 F. 2d 364 (5th Cir.); ***Hampton*** v. ***City of Jacksonville, Florida,*** 304 F. 2d 319 (5th Cir.); and *Clark* v. ***Flory,*** 237 F. 2d 597 (4th Cir.). Each is distinguishable as to questions of fact and law from the instant case and none reaches the crucial issues here; whether city officials have the power to close these swimming pools solely for a discriminatory purpose and whether the federal court has the power to order them to reopen these facilities.

Tonkins v. City of Greensboro, North Carolina

The first opinion of the District Court in ***Tonkins*** considered and decided two issues: (1) whether defendants could maintain a segregated swimming pool, and (2) if not, whether selling the pool would be an unconstitutional evasion of the obligation to operate on an equal basis. The first issue was decided for plaintiffs. The second was decided for the defendants but not as an issue of law but rather on the basis of a finding of fact that the sale was "bona fide." In no way did the Court grant a license to the city to sell as a technique of avoiding its constitutional obligations. In the present case Judge Carswell has given a "license" to Tallahassee or to any community to close an open facility in order to deny Negroes the right to use that facility.

City of Montgomery, Alabama v. Gilmore

Montgomery closed its parks pursuant to its resolution stating that there were "grave problems involving the welfare and public safety of the City of Montgomery." This was the factual context under which the Court refused to review the judgment and discretion of the commissioners. Public order was in a crisis state. In that case no one challenged this finding and for the purposes of this case it must be taken as true. No such state of facts is apparent in the present case. Nothing but the right of Tallahassee to defy the Constitution is at issue; here appellees, under the pleading, admit the improper reason for closing the pools; no official discretion in behalf of the "best interests" of the city has ever been asserted. A bold and arbitrary use of official power for the sole purpose of discriminating against appellants and members of their race confronts and challenges not only appellants but also the courts.

Hampton v. City of Jacksonville, Florida

Jacksonville closed its swimming pool after a declaratory judgment and a preliminary injunction had been issued enjoining the city from maintaining segregated swimming pools. A ruling was sought that defendants be held in contempt of the declaratory judgment which contained no direction not to close the pools. Without opinion, the District Court denied plaintiffs' motion. On appeal, this Court merely decided that there was no error in the order of the District Court; no consideration by this Court was expressed as to the issue of closing as a technique to thwart the Constitution. Whether the Court should punish public officials for contempt of a judgment containing no direction to defendants that they keep the pools open was the issue in the contempt proceeding. References by the District Court to the supposed right of the city to close its swimming facilities were merely incidental to the issue concerning contempt. The refusal to punish for contempt was the subject before this Court on that appeal. Thus the issue presented on appeal in the case currently before this Court did not reach this Court in the *City of Jacksonville* case.

Clark v. Flory

A declaratory judgment concerning desegregation of the city's parks was requested; the relief requested did not seek a reopening of the facility; and the Court concluded, *per curiam,* that the issue of desegregation became moot because the parks had already been closed. Closing the parks as an unconstitutional act was never considered; nor was the power to order reopening an issue before the Court. In fact, in that case, unlike the present case, no one contended that the Court had the power to require the State of South Carolina to operate any park. In other words, the parties eliminated the issue. What is more, the Court decided that the proper party, the State Forestry Commission, was not before the Court; that plaintiffs were warned about this and did not cure the defect, and therefore a declaratory judgment would be futile. Thus both the wrong parties and the wrong issues were before the Court.

POINT II

The Court Has the Power to Declare That the Closing Is Unconstitutional and to Order the City to Reopen the Pools.

For the reasons set forth below we urge that this Court has the power to order the officials of the City of Tallahassee to reopen the pools.

That there is ample precedent in the important cases set forth below illustrating the authority of this Court to effectuate, in some case, even greater affirmative relief than is sought here, is quite clear. Where it is necessary to effectuate an important public concern and where one of the other organs of government or a large private interest refuses or fails to do its duty, the federal courts have acted.

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In *Haynes* the federal government itself was ordered to reinstate a probationary employee. Concededly in that case the government could have discharged the employee for no reason at all, but once its discharged him for an alleged "security" reason it had to follow proper procedures even though nothing in the law as stated required this result.

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This case illustrated the power of the Court to effectuate affirmative relief when an act is done with an improper motive. In this landmark case the power of the federal courts to order school reopening was exercised against the county.

Baker v. Carr, 369 U. S. 186 (1962)

Here the federal courts were not loath, at great expense to the state, to set in motion changes in state voting procedures to accomplish constitutional results where the states had neglected the same to the effect of denying equal protection of the laws to many of its citizens.

This Court should not hesitate to grant the relief sought both to protect appellants' Fourteenth Amendment rights and to discourage appellees and others who would assert their right to exploit their governmental functions as a means of denying any group of American citizens their constitutional rights.

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In some respects, *Darlington* indicates even more strongly the power of federal courts to grant the relief sought herein by appellants. It also suggests one of the situations in which that relief is appropriate. *Darlington* is a case arising under the NLRA. Defendants owned several plants, in one of which employees sought to organize for collective bargaining. Defendants closed the plant in question shortly after the employees voted in favor of unionization. The Supreme Court remanded to the NLRB for a factual determination, with the instruction that if it were found that the purpose and effect of this closing was to intimidate workers in other plants of the company from exercising their right to organize collectively, then defendants should be ordered to reopen the plant. The Court knew reopening would require huge expenditures of money, as well as a serious limitation on the right of a business to close or to partly close its doors.

While *Darlington* presents a different area of law from the case at bar, the import of the holding bears directly on the present case. Appellees herein are public officials, not a private corporation. They have duties far beyond those of a private corporation, including a duty to uphold the United States Constitution promised under oath (Article VI, clauses 2 and 3). As a public enterprise, Tallahassee has a greater duty to uphold individual rights than does a private entrepreneur. Appellants assert not a mere statutory right, as in *Darlington*, but a constitutional right under the Fourteenth Amendment. It is thus not significant that *Darlington* was an NLRB case, under the Labor Act. That act (section 883, 8(a) (3)) prohibits employer discrimination but does not specify the types of action the Board or the courts on review may take to remedy a discriminatory situation. However, without such specification, the Court claimed the power to order a reopening of a plant after a discriminatory closing.

Similarly, although the Constitution does not specify reopening a discriminatorily closed pool as a form of relief against the infringement of civil rights such as the inquiry suffered by appellants herein, the federal courts do have inherent equitable power to issue an order directing the

reopening of the pools so as to give substance to appellants' abstract rights to equal protection, nondiscrimination, free speech, and freedom from harassment in the exercise of these rights.

CONCLUSION

We respectfully urge that the order dismissing the complaint be reversed, and that the District Court be directed to order appellees to reopen the swimming pools previously closed by appellees.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

ROCHELLE STEELE, et al., x
Appellants, :
v. :
GEORGE B. TAFT, et al., :
Appellees. :
--x

BRIEF OF APPELLANTS

INTRODUCTORY STATEMENT

On May 21, 1965 appellants filed a complaint charging appellees, officials of the City of Tallahassee, with deliberately closing three swimming pools on July 4, 1964 rather than permitting Negroes to swim in the previously all white pools. Appellants sought an order directing the City of Tallahassee to reopen and operate the three swimming pools. Without answering, appellees moved to dismiss the complaint for failure to state a cause of action. The court heard oral argument of counsel on the motion to dismiss and appellants' motion for a preliminary injunction on July 16, 1965. The motion to dismiss was granted. (See Appendix A below.)

As alleged in the complaint, this act of closing—two days after the effective date of the Civil Rights Act of 1964 and immediately after an illegal denial of access to the facilities—is a technique designed to perpetuate an unconstitutional policy, practice and custom of discrimination in public facilities in violation of the Fourteenth Amendment of the United States Constitution and the law of the land.

POINT I

THE CITY OF TALLAHASSEE INTENDED TO DISCRIMINATE AGAINST APPELLANTS ON THE BASIS OF RACE IN CLOSING ITS SWIMMING POOLS.

A. The Discriminatory Context in Which The Officials of Tallahassee Closed The Three Municipal Swimming Pools Renders Such Act Unconstitutional.

Appellants do not assert that it would be illegal under all circumstances to close the public swimming facilities in Tallahassee. However, the legal truism that

> ...(A)cts generally lawful may become unlawful when done to accomplish an illegal and [illegible] constitutional power cannot be used by way of condition to attain an unconstitutional result. Western Union Telegraph Co. v. Foster, 247 U.S. 105, 38 S.Ct. 438, 439, 247 L.Ed. 1006 (1918) (Holmes, J.)

applies to the act at issue here.

The act of closing the pools was not a legitimate exercise of a discretionary function but a misuse of a power "generally lawful" in order to discriminate against appellants and the members of their class.

Similarly, it would be "generally lawful" for a state or local government to build a new school, lease a swimming pool or golf course for private purposes to private parties or discharge a person from governmental employment, or for an entrepreneur to close a manufacturing plant. Yet such acts have been declared illegal and have been enjoined when the context of the act revealed an illegal purpose or result or when the exercise of the power ran afoul of the constitution. Taylor v. Board of Education of City School District of City of New Rochelle, 191 F. Supp. 181 (S.D.N.Y. 1960) (enjoined building of school in a location designed to continue racial imbalance). Lawrence v. Hancock, 76 F. Supp. 1004 (D.C.S.D. West V. 1948) (prohibited leasing of swimming pool because it was a technique of discrimination). Simkins v. City of Greensboro, 149 F. Supp. 562, aff'd 246 F.2d 425 (1957) (prohibited leasing of public golf course if used as technique to avoid duty to integrate and required city-lessor to supervise private lessee). Wieman v. Updegraff, 344 U.S. 183 (1952) (pay could not be denied public employees for their refusal to sign unconstitutional loyalty oath; public employment, though not an absolute right, cannot be denied for unlawful reasons). Textile Workers Union of America v. Darlington Manufacturing Company, 380 U.S. 263, 85 S.Ct. 994 (1965). (plant closed by employer in order to intimidate workers

- 1957

from exercising their right to organize may be ordered reopened).

Appellees do not deny that their purpose was to discriminate against appellants and their class as in the above cases. Appellees' motion to dismiss for failure to state a cause of action does not specify its objection to the complaint, but it must necessarily be either (1) that discrimination by government officials is not unconstitutional, or (2) that it is unconstitutional but appellees' right to close the pools transcends their duty to uphold the Constitution, or (3) that though their act was unconstitutional, and exceeded their rights and powers, the courts lack the power to enjoin it.

The first point is too well settled to warrant discussion. As for the second and third, no branch of the government has the power deliberately to violate the Constitution, and in a government of checks and balances the courts not only can but must check unconstitutional acts of other branches of government.

What we see in this case is a scheme by a municipality to put itself beyond the orbit of this Court. Under the guise of asserting its authority, it destroys the rights of appellants. Other instances of this kind of conduct have been before the courts. The power to lease and to sell public property are two of the powers that municipalities have used as techniques of discrimination to circumvent their duty to make available public facilities without discrimination. Recognizing that the real power asserted is the power to discriminate, and the power to sell or lease only the facade behind which it acts, the federal courts have not been deceived.

> (T)he power to lease does not include the power to discriminate against members of a minority race in the exercise of their constitutional rights, nor can the city by such a lease...relieve itself from its Constitutional obligation to afford to all its citizens equal rights in the use of the public swimming pool which is the subject of the lease. Lawrence v. Hancock, supra at p. 1008.

Nor does the power to sell "include the power to discriminate against members of any race." Tate v. Department of Conservation and Development, 133 F. Supp. 53 (E.D. Va. 1955), aff'd per curiam 231 F.2d 615 (C.A. 4th Cir. 1956), cert. denied 352 U.S. 838, 77 S.Ct. 58, 4 L.Ed. 2d 56. See also Hampton v. City of Jacksonville, 304 F.2d 320 (invalidating sale of golf course because of revessionary clause).

Never before, to the best of our knowledge, has a decision to discriminate, whether it be through closing, selling or leasing, been held "clearly under the law a proper function and responsibility of the elected public officials." And yet that is the result of the decision of the court below. Under Article VI, clauses 2 and 3 of the United States Constituion, the first and foremost function and responsibility of elected public officials, according to oath, is to uphold the laws and the Constitution of the United States. Exercising a power to close municipal swimming pools in the context presented before the court, a context that is uncontestably discriminatory, is a clear abdication of governmental responsibility.

B. The Discriminatory Intent and Motive Behind Appellees' Act Is Clear.

Choosing not to answer the complaint (as is their right), appellees have admitted as a fact for the purpose of this appeal

> (t)hat said closing of the aforesaid swimming pools was solely for the purpose of depriving the plaintiffs and the class they represent as aforesaid, of equal rights and equal protection of the laws and privileges and immunities; that the object of the closing of the pools was not a Constitutional one but was done purposely and deliberately on the grounds of race and opposition to desegregation..." (Complaint, XVII.)

Had appellees denied this allegation of intent, the sequence of events in itself would indicate its validity. Appellees ceased to operate the pools within hours of an attempt to use them and two days after the passage of the Civil Rights Act of 1964 containing statutory provision for redress against denial of access to public facilities on a nondiscriminatory basis. To date the appellees have not justified their action.

In the abstract a bad motive may not be subject to judicial examination. But should it lead to governmental action in violation of the Constitution the court should exercise the judicial power to uphold constitutionally protected rights. Thus the Supreme Court has refused to permit state courts to enforce a private discriminatory contract in defiance of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1., 68 S.Ct. 836, 92L.Ed. 1161 (1948)

And so where the only intent of the State in negotiating a lease of a State park to private parties was the maintenance of discrimination, the court enjoined the making of such a lease. *Tate v. State Department of Conservation and Development*, *supra*.

In the instant case judicial failure to restrain the closing of the swimming pools as an unconstitutional action provides improperly motivated officials with a legal means to violate the Fourteenth Amendment, with a weapon to carry out a clearly discriminatory intent. The court below suggested that appellees' policy might be "tragically absurd." Appellees must not be merely criticized but must not be allowed to use any technique to implement a policy which is not only tragically absurd but unconstitutional. In condemning the act, the court has not deprived appellees of their belief that discrimination pays off as public policy. This Court should deprive them, constitutionally, of the right to turn private motives into unconstitutional "state" action.

C. The Constitutional Right to Be Free From Discrimination Is The Right Appellants Urge Upon This Court.

Freedom from discrimination, the right to be treated as all others are treated, is the right appellants urge upon this Court. Appellants do not assert any absolute right to force the City of Tallahassee to build and operate swimming pools for the pleasure of appellants. But, we urge, they do have the right to be permitted to use pools operated by the municipality and closed solely for the purpose of depriving appellants of equality with other citizens.

A "right to swim" in the abstract may be compared to a so-called "right to public employment." Neither are rights in an absolute sense. *Wieman v. Updegraff*, *supra*, reversed a state court decision depriving public employees of earnings after invalidating a particular loyalty oath as a qualification for public office. Although there was no abstract right to public employment there was a right not to be discharged for unconstitutional reasons.

> (W)e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that Constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Wieman v. Updegraff*, *supra*.

Herein, although appellants have no abstract right to swim, they do have a right not to be deprived of swimming in the municipal swimming pools for an unconstitutional reason. They were excluded by appellees pursuant to a patently arbitrary and discriminatory policy; constitutional protection must be extended to these appellants. The only way to protect appellants constitutionally is to grant an injunction ordering the appellees to reopen the pools. To permit them to remain closed is in effect to deny the Constitution to appellants. And yet in order to preserve the equality of the vote the federal courts have understood their duty and directed major changes in state legislative systems. *Baker v. Carr*, 369 U.S. 186 (1962).

D. *The Decision of The Lower Court Dismissing The Complaint Was in Error and Should Be Reversed*.

1. *The four cases cited by the court below as "virtually identical" with this case, are not so in fact and were improperly relied upon*.

The District Court relied upon *Tonkins v. City of Greensboro, North Carolina*, 162 F. Supp. 549; *City of Montgomery, Alabama v. Gilmore*, 277 F.2d 364 (5th Cir.); *Hampton v. City of Jacksonville, Florida*, 304 F.2d 319 (5th Cir.); and *Clark v. Flory*, 237 F.2d 597 (4th Cir.). Each is distinguishable as to questions of fact and law from the instant case and none reaches the crucial issue here: whether city officials have the power to close these swimming pools solely for a discriminatory purpose and whether the federal court has the power to order them to reopen these facilities.

(a) *Tonkins v. City of Greensboro, North Carolina*

The first opinion of the District Court in *Tonkins* considered and decided two issues: (1) whether defendants could maintain a segregated swimming pool, and (2) if not, whether selling the pool would be an unconstitutional evasion of the obligation to operate on an equal basis. The first issue was decided for plaintiffs. The second was decided for the defendants, but not as an issue of law but rather on the basis of a finding of fact that the sale was "*bona fide*." In no way did the court grant a license to the city to sell as a technique of avoiding its constitutional obligations.

(b) *City of Montgomery, Alabama v. Gilmore*

Montgomery closed its parks pursuant to its resolution stating that there were "grave problems involving the welfare and public safety of the City of Montgomery." This was the factual context under which the court refused to review the judgment and discretion of the commissioners. Public order was in a crisis state. No such state of facts is apparent in this case. Nothing but the right of Tallahassee to defy the Constitution is at issue; here appellees, under the pleading, admit the improper reason for closing the pools; no official discretion in behalf of the "best interests" of the city has every been asserted. A bold and arbitrary use of official power for the sole purpose of discriminating against appellants and members of their race confronts appellants and this Court.

(c) Hampton v. City of Jacksonville, Florida

Jacksonville closed its pool after a declaratory judgment and a preliminary injunction had been issued enjoining the city from maintaining segregated swimming pools. Thereafter Jacksonville closed the pools. A ruling was sought that defendants be held in contempt of the declaratory judgment which contained no direction not to close the pools. Without opinion, the District Court denied plaintiffs' motion. On appeal, this Court merely decided that there was no error in the order of the District Court; no consideration by this Court was overtly given to the issue of closing as a technique to thwart the Constitution. Whether the court should punish public officials for contempt of a judgment containing no direction to defendants to remain open [illegible] the issue in the contempt proceeding. References by the District Court there-of the right of the city to close were merely incidental to the issue concerning contempt. The refusal to punish for contempt was the subject before this Court on that appeal. Thus the issue presented on appeal in the case currently before this Court did not reach this Court in City of Jacksonville.

(d) Clark v. Flory

A declaratory judgment concerning desegregation of the city's parks was requested; the relief requested did not seek a reopening of the facility; and the court concluded, per curiam, that the issue of desegregation became moot because the parks had already been closed. Closing the parks as an unconstitutional act was never considered; nor was the power to order reopening an issue before the court. In fact, in that case, unlike the present case, no one contended that the court had the power to require the State of South Carolina to operate any park. In other words, the parties eliminated the issue. What is more, the court decided that the proper party, the State Forestry Commission, was not before the court; that plaintiffs were warned about this and did not cure the defect; and that therefore a declaratory judgment would be futile. Thus the wrong parties and the wrong issues were before the court.

2. The decision of the District Court establishes a dangerous precedent.

The power to close, if we are to follow the court below, unlike the power to lease or sell, includes the power to close in order to discriminate. No reasons are given except the existence of the naked power.

The lower court implies that there is no discrimination because the pools are closed to whites as well as Negroes.

It is true that the pools are not presently being operated at all. But not to be ignored is the undisputed fact that the pools were closed to hurt appellants. The hurt to the white community is an incident of the main wrongdoing. The court below tried to substitute the superficial result of equal punishment to all in place of the clearly unconstitutional motivation of appellees for the closing.

POINT II

A MAJOR EFFECT OF THIS DISCRIMINA- [illegible]

The real effect of closing the pools is as unlawful as the motivation behind the closing. Closing under the circumstances of this case presents Negroes with the dilemma of losing similar public facilities in entirety if they attempt to exercise their right to use such facilities on a desegregated basis. Citizens of the United States should not be placed in the position of having to choose between segregated public facilities or none at all. The municipal swimming pools, a source of recreation to all of the residents of Tallahassee, were closed in direct retaliation against appellants' legal attempt to use them as the law requires—on an integrated basis. The loss weighs heavily on both Negroes and whites. But the weight of the loss is by no means equal.

Aside from the fact that Negroes have lesser means than whites for providing private substitutes, the greatest burden of the closing of the pools is that Negroes are thereby intimidated from further attempting to exercise their constitutional rights to enjoy public facilities on a nonsegregated basis. If appellees' intransigence will lead them so far as to close a facility upon which all residents of Tallahassee are so dependent, what else, all Negro residents must ask themselves, would they not be willing to close rather than integrate? In proportion, as other facilities are needed and valued by Negroes, so will Negroes be hesitant to risk their loss because of attempting to enjoy their use on an integrated basis.

Appellees could not by direct means compel appellants and their class to accept segregation of public facilities. They must not be allowed to "accomplish by indirection exactly what the courts have said could not be done." See *Tate v. State Department of Conservation and Development*, *supra*. To implement the law of the land these officials must not be allowed to hold the threat of closing over appellants' heads. The power to retaliate against those who attempt to exercise their constitutional rights must be denied appellees. To the appellants, who desire both to swim in the public pools and to do so without the shame and indignity of having to accept segregated pools, it is cold comfort that whites too may no longer swim in the municipal swimming pools. Appellants and members of their class suffer from the vindictive and intimidatory punitive effect of the closing and will suffer irreparable damages unless appellees are enjoined from committing such acts.

POINT III

THE COURT HAS THE POWER TO DECLARE THAT THE CLOSING IS UNCONSTITUTIONAL AND TO ORDER THE CITY TO REOPEN THE POOLS.

For the reasons set forth below we urge that this Court has the power to order the officials of the City of Tallahassee to reopen the pools.

That there is ample precedent in the important cases set forth below illustrating the authority of this Court to effectuate, in some cases, even greater affirmative relief than is sought here, is quite clear. Where it is necessary to effectuate an important public concern and where one of the other organs of government or large private interest refuses or fails to do its duty, the federal courts have acted.

[illegible] v. Thomas, 232 F.2d 688 (D.C. Cir. 1956)

In [illegible] the federal government itself was ordered to reinstate a probationary employee. Concededly in that case the government could have discharged the employee for no reason at all, but once it discharged him for an alleged "security" reason it had to follow proper procedures even though nothing in the law as stated required this result.

Similarly, defendant city here might legitimately close the pool for no reason but not for an unconstitutional one made manifest by its actions herein.

Griffen v. County School Board of Prince Edward County, 377 U.S. 218, 84 S.Ct. 1126, 12 L.Ed. 2d 256 (1964).

This case illustrated the power of the court to effectuate affirmative relief when an act is done with an improper motive. In this landmark case the power of the federal courts to order school reopening was exercised against the county.

Baker v. Carr, 369 U.S. 186 (1962).

Here the federal courts were not loath, at great expense to the state, to set in motion changes in state voting procedures to accomplish constitutional results where the states had neglected the same to the effect of denying equal protection of the laws to many of its citizens.

This Court should not hesitate to grant the relief sought both to protect appellants' Fourteenth Amedment rights and to discourage appellees and others who would assert their right to exploit their governmental functions as a means of denying any group of American citizens their constitutional rights.

Textile Workers of America v. Darlington Manufacturing Company, 380 U.S. 263, 85 S.Ct. 994 (1965).

In some respects, Darlington indicates even more strongly the power of federal courts to grant the relief sought herein by appellants. It also suggests one of the situations where that relief is appropriate. *Darlington* is a case arising under the NLRA. Defendants owned several plants, in one of which employees sought to organize for collective bargaining. Defendants closed the plant in question shortly after the employees voted in favor of unionization. The Supreme Court remanded to the NLRB for a factual determination, with the instruction that if it were found that the purpose and effect of this closing was to intimidate workers in other plants of the company from exercising their right to organize collectively, then defendants should be ordered to reopen the plant. The Court knew reopening would involve huge expenditures of money, as well as the serious question of the right of a business to close or to partly close its doors.

While *Darlington* presents a different area of law from the case at bar, the import of the holding bears directly on the present case. Appellees herein are public officials, not a private corporation. They have duties far beyond those of a private corporation, including a duty to uphold the United States Constitution promised under oath (Article VI, clauses 2 and 3). As a public enterprise, Tallahassee has a greater duty to uphold individual rights than does a private entrepreneur. Appellants assert not a mere statutory right, as in *Darlington*, but a constitutional right under the Fourteenth Amendment. It is thus not significant that *Darlington* was an NLRB case, under the Labor Act. That act (section 883)

8(a)(3), see Appendix B) prohibits employer discrimination but does not specify the types of action the Board or the courts on review may take to remedy a discriminatory situation. However, without such specification, the Court claimed the power to order a reopening of a plant after a discriminatory closing.

Similarly, although the Constitution does not specify reopening a discriminatorily closed pool as a form of relief against the infringement of civil rights such as the injury suffered by appellants herein, the federal courts do have inherent equitable power to issue an order directing the re-opening of the pools so as to give substance to appellants' abstract right to equal protection and nondiscrimination.

CONCLUSION

We respectfully urge that the order dismissing the complaint be reversed, and that the District Court be directed to order appellees to reopen the swimming pools previously closed by appellees.

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UNITED STATES COURT OF APPEALS
Fifth Circuit

Civ. Case 1073-65

ROCHELLE STEELE, et al.,
Appellants,
v.
GEORGE B. TAFT, et al.,
Appellees.

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UNITED STATES COURT OF APPEALS

Fifth Circuit

Civ. Case 1073-65

ROCHELLE STEELE, et al.,
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v.

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Appellees.

SUPPLEMENTARY BRIEF OF APPELLANTS

INTRODUCTION

Meant merely as a supplement to the original brief submitted by the Appellants previously, this brief discusses discretionary powers of a municipality, relying on our earlier brief, particularly those pages (7-8) which, we urge successfully distinguish the cases cited by the Court below in dismissing the Complaint herein; nor do we believe there is any need to set forth the facts. For the purposes herein it is agreed that the Defendants, various officials of the City of Tallahassee, closed previously racially segregated swimming pools in order to deprive Plaintiffs of equal protection of the law and their privileges and immunities as citizens.

(See paragraphs XIII through XVII of the complaint,R.6-9)

SUMMARY OF ARGUMENT

In its order of dismissal (R 15-17) the Court below relied upon the cases we attempt to distinguish (pp 7-9, main brief). Added to this however, is the argument made by the Court and relied upon by Appellees, that there are no definable limits to the power of a municipality to discontinue a discretionary function; while more graciously put, (R-17) the Court below accepts this argument - the pools may be closed so as to deny Negroes the right to use them on a non-discriminatory basis "on the face of it such policy may seem tragically absurd, but such decision is clearly under the law a function and responsibility of the elected public officials and the officers and employees working under them".

We urge, First of all, that this cannot, nor should it be the law although, from our examination, the particular question is novel. Were this the applicable law a mockery could be made of the Constitution. Merely by closing down needed or accepted public facilities to all equally, Negro and white, even to such an all-important institution as the public schools this tragic argument would apply. (See statement of Justice Black in the Prince Edward County case.) 377 U.S. 218,@ 231.

Were we to state that our schools were a discretionary activity (and some do) then the same argument applies. The sounder argument, we claim, and for which we give our reasons below, limits the discretion of Tallahassee to the boundaries set forth in the U.S. Constitution.

Secondly we argue that reference to other comparable situations suggest strongly that while certain public and private institutions have broad discretionary powers, such powers cannot be executed for an illegal purpose. We suggest that violation of the U.S.Constitution is such an illegal purpose.

Thirdly it is our contention that although the right of a Court of Equity to correct such wrong may not be explicitly set forth, inherent in the power of the Court is the duty to make such orders as will eliminate the particular illegal conduct.

I

It cannot be contradicted, neither in the context of this case nor in the reality of what happened, that these pools were closed solely to prevent Negro persons from using the all-white pools; the right to use such public facilities on a non-segregated basis requires no citation.

No less it is a wrong to close public facilities for racial reasons than it is to operate them in a racially violative manner. In each case race is the dominant factor guiding the decision. Simply stated, had not the request to use the pools on a non-segregated basis been made by Negroes, the pools would not have been closed during the hot summer on the anniversary of American Independence.

With race the dominant factor in the action taken by Appellees, it is somewhat specious to say that this mid-summer hardship falls equally on whites as well as Negroes. But this is what Appellees urge (p.4 of Appellee's brief of previous argument). Protecting the segregation of the races is not the function of municipal government, anymore than that of State or Federal government, and denying the use of discretionary service to all in order to prevent non-segregated use by Negroes confronts us with a question similiar to that described in Loving v. Virginia 388 U.S. 1(1967).

In that case the miscegenation statute of Virginia was at issue. As before us the Court was concerned with a broad power of the State, namely matrimonial relations, and the argument was made in defense of the statute that the denial of a right to inter-marry applied equally to whites as well as Negroes. Therefore there was no denial of equal protection of the law. But the Supreme Court rejected this argument, as broad as the power of the State is over marriage it cannot be used to deny rights under the Constitution. Anti-miscegenation statutes which punished equally both white and Negro participants and which "equally" prevented married whites and Negroes from living in the State of Virginia are unequivocally unconstitutional. Virginia and every other State of the Union cannot deny Negroes and whites, equally or unequally, the right to live together, marry, cohabit,or pursue happiness together.

The arbitrary and racially discriminatory closing of all the swimming pools cannot be upheld on an equal application theory or used in that sense to say that Plaintiff and other Negroes are not being denied equal protection of the laws because the City by this act treats whites and Negroes equally. The Supreme Court answers the question presented:

> "Because we reject the motion that the mere 'equal application' of a statute containing racial classi-

fication is enough to remove the classification from the Fourteenth Amendment's proscription of *all* invidious racial discriminations ... we do not accept the State's contention that these statutes should be upheld ..." p.8. The Court continues its discussion of the State's equal application "theory in *Loving* to include *all* state or official governmental action ... "the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."p 10.

Closing here as an official act is the same in purpose and effect as maintaining separate facilities. It perpetrates all the stigmas and injustices inflicted upon the Negro race and continues to tell Negro citizens that they cannot mingle and live in a community and pursue human happiness if they choose to do so on equal terms with white citizens.

In substance, then Tallahassee tells us that whatever rights Appellants may have, political, legislative, etc., no right exists, however, to resort to the Courts to obtain relief in the case at bar.

A somewhat similiar question was presented in Fay v. Douds 172 F2d.720. The National Labor Relations Act provided no remedy in the Courts to the then non-complying union. Nevertheless the Court of Appeals for the Second Circuit specifically made clear that where a constitutional right is shown, even though the remedy in the law appears to be solely with the administrative board, the Court will see that the constitutional right is protected.

Where it is needed to protect the Constitution, the apparent absence of a specific Court remedy, will not deny the right of the Court to infer one. The bounds of broad administrative power are limited by the requirements of the Constitution. So also does the Constitution limit the broad power of municipal government.

II

On pages 9 - 12 of our main brief we have set forth several cases in which limits were set by the Federal Courts to discretionary conduct by the U.S. Government, Haynes v. Thomas 232 F2d. 688 (1956), to a county school board; Griffen v. County School Board of Prince Edwards County 377 U.S.218 (1964); to a State Legislature: Baker v. Carr, 369 U.S.186

(1962), to the right of a private employer to close its business: Textile Workers of America v. Darlington Manufacturing Company, 380 U.S. 263 (1965)

In each case no explicit power of the Federal Court to act in the broad manner it did existed; nor did any of these situations have obvious self-limiting characteristics. To discharge a probationary employee for no reason at all is the right of any employer, certainly the U.S. (Haynes, infra). Having discharged him, however, explicitly for reasons that demand special treatment (security reasons), in order to uphold due process, then the apparently absolute discretion fades before the due process clause, and the employee is entitled to the hearing that is normally not the right of a probationary employee.

What right would seemingly be more secure than that of a bussinessman to close his doors. To operate and to close a business whether previously profitable or not, one would believe is beyond the scope of the law. (This assumes, of course, that laws equally applicable to all, e.g. internal revenue etc., are observed.)

Nothing in the Labor Act makes evident the power of the Board to order the opening of a business, that is nothing except the need to prevent a mockery of the law. And so, affirmatively, a plant is ordered reopened in order to uphold the purposes of the law, of less cost, but no less important is the issue concerning the impropriety of the Tallahassee act in closing the pools. As in Darlington a reopening should be directed. In any event the posture of this case is merely that the Court below declared we had no cause of action. Cases such as Haynes and Darlington indicate the error below.

III

What we seek is an injunction to place Appellants in the posiiton they would be if Appellees had not illegally closed the pools.

Normally such order would entail the restraint of particular conduct of the offending party. Futility is not the object of orders of the Court. Although magnanimously, Tallahassee agrees it may not operate the pools in a discriminatory manner, nor may it sell or lease them to one who will operate them in such fashion, such acceptances by Tallahassee do not meet the needs of the problem, namely the discriminatory closing of these pools in order to prevent their non-discriminatory use by Appellants. Only an order that requires their operation and prevents their being closed for any reason that thwarts the purposes of the United States Constitution places Appellants in the proper position.

Within this framework is contained the possibility that the pools might be closed for an appropriate municipal reason. Whether or not the reason for the closure is an appropriate one, or merely the cover for an unconstitutional one, may have to be the subject of a proceeding, but this is not an unusal duty of any court. We request that Appellees be directed to reopen the three swimming pools, to operate them open to all on a non-discriminatory basis; that Appellees may not lease, sell or license any use to one who will operate the property in a discriminatory fashion; that Apellees may not close said pools for any reason in order to deprive Appellants, and the class they represent of their use because they are Negroes,

CONCLUSION

For the various reasons stated we urge that the judgment of the Court below shall be reversed, and that an order be entered directing the reopening of said pools on a non-discriminatory basis, or alternatively that the case be returned to the District Court for trial on the merits, and that Appellants have the costs of this appeal.

Respectfully submitted,

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New York, N.Y. 10038

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Tallahassee, Florida

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FEB 19 1966

United States Court of Appeals for the Fifth Circuit

New Orleans La.
February 17, 1966

FOR INFORMATION OF ALL COUNSEL—PLEASE READ CAREFULLY:

Re: No. 23125 - Rochelle Steele, Et Al vs.
George B. Taft, Et Al

The record in the above entitled case is in final form. The time for filing BRIEFS is indicated in the following rule.

RULE 24, as amended, Subsections 1, 3 and 4 OF THIS COURT, READ IN PERTINENT PART AS FOLLOWS:

> **1. The Clerk shall mail a notice to each party or his counsel so soon as the record by printing, or otherwise, is in final form for a hearing. The counsel for the appellant, or petitioner, shall file with the Clerk of this Court within thirty days from the RECEIPT of such notice ***** twenty copies of a printed brief, one to be signed in handwriting by an attorney of this Court who has entered an appearance in the case; together with a certificate that a copy has been mailed to or previously served on the opposite party or parties. Four copies of typewritten briefs in behalf of poor persons in forma pauperis cases, with a like certificate of service, shall be sufficient. [All such typewritten briefs (motions or petitions, etc.) should be backed when filed.]**
>
> **3. The Counsel for appellee or respondent shall file with the Clerk of this court within twenty (20) days from the service upon him of opponent's brief ***** twenty copies of a printed brief, with a certificate that a copy has been mailed to or personally served on his opponent or opponents. His brief shall be of a like character with that required of the appellant or petitioner, except that no specification of errors shall be required and no statement of the case unless that presented by the appellant or petitioner is controverted.**
>
> **4. Reply or supplemental briefs in printed form, and containing a certificate of service upon opposing counsel, may be filed at any time without special leave of court.**
>
> **Certificate of service upon *all* opposing counsel *must* be incorporated in *all* copies of briefs, motions, petitions or other documents filed.**

Since the Court desires that briefs from all parties be on file for its consideration well in advance of the assigned date for hearing, counsel should make every effort to file their briefs by the date due.

Notice will be issued to all counsel for whom an appearance has been entered of the date and place fixed for hearing, usually at least thirty (30) days in advance thereof.

RULE 25, as amended January 19, 1956, reads in part as follows:

> **"Not more than one-half hour on each side will be allowed for the argument, without special leave of the court **." (See important notation below)***

However, counsel for any party may waive oral argument and submit his case on brief, if he so desires, and notifies this office by the date fixed for hearing.

Any written request for special handling not provided for in the Rules, whether by formal motion, letter or otherwise, as well as any information which counsel desire the Clerk to communicate to the Court, should be submitted in quadruplicate, with an original and three legible copies.

EDWARD W. WADSWORTH
Clerk

---

* In order to facilitate the calendaring of the cases so that each day's arguments will not be unduly extended, the Clerk's office must be advised by the time the briefs are filed as to how many counsel will expect argument (not more than two for each party), and how much time each will need. This is particularly true of multi-party appeals. The Court upon the hearing "may allow such less time as shall appear to it sufficient for a fair presentation of the questions involved . . ." Rule 25 (3).

FEB 19 1966

COURT RULES

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Before Tuttle, Chief Judge and Rives, Jones, Brown, Wisdom, Gewin,
and Bell, Circuit Judges.

ORDER ADOPTING RULE 23(6)

It is ORDERED that the rules of this court be and they are hereby amended by adding Section (6) to Rule 23, as follows:

(6) The provisions of subdivisions (a), (b), (c), (d), (e), (f), (g) and (i) of Rule 75, Federal Rules of Civil Procedure, are not applicable to appeals to this court from a District Court.

Dated: July 28, 1964

ORDER ADOPTING RULE 24 (2)(e)

It is ORDERED that the rules of this court be and they are hereby amended by adding subsection (e) to Rule 24(2), as follows:

(e) Except by permission of the court, briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and an addendum containing statutes, rules, regulations, etc.

Effective: September 1, 1964

FEB 19 1966

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

New Orleans, Louisiana

Please be advised that briefs from both parties must be on file in advance of the assignment of this case for hearing on a yet undetermined date during this next Term beginning in October of this year. Accordingly, in order that this Court may meet its schedule of sittings for this entire next Term, your brief should be filed on time in accordance with the Court's rules.

EDWARD W. WADSWORTH,
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROCHELLE STEELE, et al.,
Appellants

- against -

GEORGE B. TAFT, et al.,
Appellees

NO.: 23125-65

To the Clerk of the Court of Appeals for the Fifth Circuit, and ROY T. RHODES, Esq., and RIVERS BUFORD, JR., Esq.

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of STEPHEN M. NAGLER, sworn to on the 23rd day of March, 1966, and upon all other papers and proceedings heretofore had, appellants will move this Court at the United States Court House, on a day to be fixed by the Court, for an Order Advancing the Oral Argument of the within appeal to the Spring Term, 1966, and for such other, further or different relief as may to the court appear just and proper.

DATED: New York, New York
March 23, 1966

Yours, etc.
Carl Rachlin
CARL RACHLIN,
ATTORNEY FOR APPELLANTS
Office & P.O. Address
38 Park Row
~~Room~~
New York, New York

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROCHELLE STEELE, et al.,
Appellants

- against -

GEORGE B. TAFT, et al.,
Appellees

MOTION TO ADVANCE
ORAL ARGUMENT APPEAL

Appellants through their counsel respectfully move the Court for an Order Advancing the Oral Argument in the above entitled cause so that it may be heard during Spring Term, 1966.

The reasons for which the appellants urge that this motion be granted are, as more fully appear in the attached affadavit of STEPHEN M. NAGLER: that 1, the appeal in this case has already been inordinately delayed through no fault of the appellants; and further delay would increasingly prejudice their rights.
2. The relief requested, to wit, an order that the Tallahasse swimming pools be reopened would be most appropriate at or before the beginning of the summer, and would be meaningless after the Fall Term.

Carl Rachlin

CARL RACHLIN,
ATTORNEY FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROCHELLE STEELE, et al.,
Appellants

- against -

NO.: 23125-65

GEORGE B. TAFT, et al.,
Appellees

STATE OF New York)
) ss
COUNTY OF New York)

STEPHEN M. NAGLER, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York and associated with CARL RACHLIN, Esq., one of the attorneys for the appellants in the above entitled case.

2. The statements made in this affadavit other than those referred, to my own knowledge are made upon information and belief. The source of my information and belief consist of facts disclosed by the files of CARL RACHLIN and JOHN D. DUE, JR., attorneys for the appellants, the record in this case and/or Clerk for the United States District Court of the Northern District of Florida.

3. On or about the 21st day of May, 1965, appellants filed a complaint as appears in the record on pp. 1-11. On or about the 4th day of June, 1965, appellees filed motions to dismiss the complaint (see record pp 11-13). On July 14, 1965, appellants filed a Motion For A Temporary Restraining Order and a Preliminary Injunction, (see record page 14).

4. On July 16, 1965, a hearing on all motions was held before the Honorable G. Harrold Carswell, United States District Judge (see record pp24-61). The official court reporter present at that hearing was Mrs. Hattie Bell Love.

5. On or about July 19, 1965, the Honorable G. Harrold Carswell filed an order granting appellees motion dismissing the complaint. Notice of Appeal was filed on July 23, 1965 and the Designation and An Amended Designation Of Record were filed on or about August 2, 1965.

6. Thereafter, on or about the 12th day of August, 1965, appellees filed their Designation Of Record requiring inter alia that the minutes of the entire proceedings before the court on the hearing held July 16, 1965, be included in the record (see record p20).

7. Shortly thereafter, Mrs. Hattie Bell Love, the official court reporter, entered a hospital for an operation to remove a breast cancer and for approximately four months she was seriously ill and unable to perform her office. It is partly on the basis of this fact that appellants sought and recieved an extension of time for filing the Record of Appeal.

8. The transcript of proceedings was not filed in the Office of the Clerk of the United States District Court until December 16, 1965. The delay was solely caused by the illness of the aforementioned official court reporter, Mrs. Hattie Bell Love, and was through no fault of either the appellants or anyone else concerned.

9. The lateness in filing the Transcript Of Proceedings was the sole cause of the late filing in printing of the record in this case, and is responsible

for the delay in argument of this appeal. Appellants should not be compelled to accept a delay in the relief which they seek due to the aforementioned cause which was beyond their control.

10. The relief sought by appellants, namely an order directing appellees to reopen and operate the swimming pools of the City of Tallahassee would be timely and appropriate during or prior to the summer months of the year. A delay until the Fall Term of this Court would be a continuance of the wrongful denial of relief to appellants during the time of year at which such relief would be needed. An order directing the appellees to reopen the swimming pools entered during or after the Fall Term of this Court would be meaningless and would condone the wrongful conduct of appellees for another year.

WHEREFORE IT IS RESPECTFULLY PRAYED THAT THE ORAL ARGUMENT OF THE APPEAL IN THE ABOVE ENTITLED CASE BE ADVANCED TO THE PRESENT TERM OF THIS COURT SO THAT AN EARLY DETERMINATION OF THE MERITS MAY BE ARRIVED AT.

Stephen M. Nagler
STEPHEN M. NAGLER

SWORN TO BEFORE ME ON:

March 23, 1966

Freda R. Strent
FREDA R. STRENT
NOTARY PUBLIC, State of New York
No. 24-3076575
Qualified in Kings County
Cert. filed in New York County
Commission Expires [illegible]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
OCT 25 1967
EDWARD W. WADSWORTH
CLERK

No. 23125

ROCHELLE STELLE, ET AL,

Appellants,

versus

GEORGE B. TAFT, ET AL,

Appellees.

- - - - -

Appeal from the United States District Court for the
Northern District of Florida

- - - - -

Before BROWN, Chief Judge, TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER and SIMPSON, Circuit Judges.

BY THE COURT:

The Court on its own motion having determined to have this case reargued en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

FILE COPY

File Tallahassee swimming pool case

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23841

HAZEL PALMER, et al.,

Appellants,

v.

ALLEN C. THOMPSON, Mayor,
City of Jackson, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI, JACKSON DIVISION

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ARGUMENT I

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23841

HAZEL PALMER, et al.,

Appellants,

v.

ALLEN C. THOMPSON, Mayor,
City of Jackson, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI, JACKSON DIVISION

BRIEF FOR APPELLANTS

Preliminary Statement

This is an appeal from the judgment of the district court dismissing appellants' complaint for temporary and permanent injunctive relief on the grounds that they were not entitled to any of the relief sought therein.

Statement of the Case

On or about August 5, 1965, appellants, adult black residents, citizens and taxpayers of the City of Jackson, Mississippi, (hereinafter sometimes referred to as the City) instituted a class action by the filing of a verified complaint in which they alleged that the said City had theretofore (1) closed all of its swimming pools and other recreational facilities [Complaint, par. 13(a)], (2) eliminated the public restrooms formerly maintained in City Hall and the Municipal Court House [Id., par. 13(b)], (3) constructed and maintained an auditorium, known as "College Park Auditorium", and a park and swimming pool, known as "College Park" which were intended and designed to be exclusively for the use of black residents of the City in order to deny them equal access to the City Auditorium and the remainder of its parks and swimming pools [Id., par. 13(c), and (4) constructed, maintained and operated separate facilities and accommodations for black inmates at the City Jail [Id., par. 13(d).

Among other things, the complaint sought temporary and permanent injunctive relief enjoining appellees, the Mayor, the Commissioners, the Police Chief and the Director of Recreation of said City, "from continuing to persist in their unlawful conduct" and requiring them "to use all of the power and authority provided by law for the purpose of making the aforesaid public facilities available to the plaintiffs and the class of persons they represent[1] on an integrated and equal basis with all other persons. . . ."

---

[1] Appellants sued on their own behalf "and on behalf of thousands of their fellow Negro citizens and residents of the City of Jackson and County of Hinds and State of Mississippi who are similarly situated because of race or color." [Id., par. 6].

Shortly after the filing of the said complaint, appellees filed and served an answer thereto in which, among other things, they denied that the complaint stated a cause of action [Answer, par. 1], that the district court had jurisdiction over the subject matter thereof [Id., par. 2,3, and 4], or that the litigation constituted a proper class action [Id., par. 6]. While admitting the closing of all public swimming facilities in 1963, they maintained that the reason therefor was that "said facilities could not be safely operated on an integrated basis without endangering the lives and property of both races of the City of Jackson" [Id., par. 13]. Moreover, appellees conceded that the City Jail was segregated on a racial basis "for the maintenance of proper discipline and for the safety and protection of the members of both races" [Id., par. 13(d)].

After joinder of issue and the filing of affidavits by various parties and their witnesses, the district court, following a hearing on appellants' motion for temporary injunctive relief, denied said motion in a letter-opinion dated September 14, 1965. In essence, after reviewing all of appellants' claims, the court concluded that they had not shown "by a preponderance of the evidence any need or necessity for an injunction, or the propriety of the issuance of an injunction by this Court under the circumstances shown." Subsequently, the parties stipulated that, pursuant to the district court's suggestion, the hearing would be submitted to it for a final decree on the merits. Accordingly, the district court later issued special Findings of Facts and Conclusions of Law and entered a final judgment denying injunctive relief.

On original appeal to this Court, appellants sought review on two points only. As set forth in the unanimous opinion of August 29, 1967, affirming the judgment below, these points were as follows:

> **First Point**
>
> Where a local government closes its previously segregated public facilities to avoid a judgment declaring that Negroes have a right to use the facilities on an integrated basis, the closing violates the equal protection clause of the Constitution of the United States and Negro residents have a cause of action against the local government to compel re-opening of the facilities. The trial court erred in denying appellants' request for injunctive relief from appellees' discriminatory closing of the pools.
>
> **Second Point**
>
> Segregation of the races in municipal jails is forbidden by the Fourteenth Amendment. Where segregation of public facilities is pursuant to a state statute, such statute is unconstitutional as contrary to the Fourteenth Amendment, and the trial court erred in denying appellants' request to enjoin operation of such facilities in a segregated manner.[2]

The district court's Findings of Fact and Conclusions of

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[2] Opinion, Pp. 2-3.

Law as to each of these points were as follows:

First Point (Swimming Pools)

Findings of Fact

> "The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of Clark v. Thompson, 206 F.Supp. 539, affirmed 313 F.2d 637, cert. den. 376 U.S. 951, 84 S.Ct. 440, 11 L.Ed.2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these public swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool[3] in 1964."[4]

Conclusion of Law

> "The plaintiffs have no constitutional right to require the City of Jackson to maintain or operate specific facilities such as swimming pools, benches in parks, or public rest rooms in any particular building. Any public facility furnished by the City would have to be available to all citizens regardless of race. As to whether any particular facility will be furnished, the City officials exercise judgment on a matter committed to their wisdom which is not subject to review by any Court in the absence of

---

[3] In 1960, the City leased the Leavell Woods Swimming Pool and thereafter operated it as a recreational facility until 1964 when it cancelled its leasehold interest. The pool is now operated on a racially segregated basis for white patrons only by the Southwest Brance of the Young Men's Christian Association.

[4] Opinion, p. 3.

> violation of constitutional rights. City of Montgomery v. Gilmore, U.S.C.A. 5th, 277 F.2d 564; Lagarde v. Recreation & Park Commission, D.C. La., 229 F.Supp. 379. No person has a constitutional right to swim in a public pool. Tonkins v. City of Greensboro, D.C. N.C., 162 F.Supp. 549. Where a public facility is closed to members of all races, any issue as to discrimination becomes moot. Clark v. Flory, U.S.C.A. 4th, 237 F.2d 597; Wood v. Vaughan, D.C. Va., 209 F.Supp. 106; Walker v. Shaw, D.C. S.C., 209 F.Supp. 569." 5/

Second Point (City Jail)

Findings of Fact

> "Separate facilities and accommodations for white and Negro prisoners are maintained in the City jail. Such a separation in the jail is necessary for the maintenance of proper discipline and for the safety and protection of prisoners of both races. There is no discrimination between the races as to the quality of the facilities afforded in the jail. None of the plaintiffs was an inmate of the municipal jail at the time this action was filed, and none of them has been an inmate of said jail at any time since said date." 6/

Conclusions of Law

> "The plaintiffs lack standing to enjoin the operation of jail facilities on a segregated basis where none of them is an occupant of said facilities. Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed. 2d 512; McCabe v. Atchison T. & S.F. Ry.Co., 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169; Brown v. Board of Trustees, U.S.C.A. 5th, 187 F.2d 20; Kansas City, Mo., et al. v. Williams, et al., U.S.C.A. 8th, 205 F.2d 47; Clark v. Thompson, D.C. Miss., 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 11 L.Ed.2d 312, 376 U.S. 951, 84 S.Ct. 440.

5/ Opinion, p. 4

6/ Id., p. 6

> "The City is required by Section 3374-135, Mississippi Code of 1942, to provide separate facilities for prisoners with respect to race and sex. Federal Courts are reluctant to interfere in the administration of state prisons. United States ex rel. Wagner v. Ragen, 7 Cir., 213 F.2d 294; Adams v. Ellis, 5 Cir., 197 F.2d 483; Curtis v. Jacques, D.C., 130 F.Supp. 920; and United States ex rel. Yaris v. Shaughnessy, D.C., 112 F.Supp. 143. No one has a constitutional right to integrated jail facilities, and same may be operated on a segregated basis where separation is deemed necessary for the maintenance of proper discipline and for the safety of the prisoners. Nichols v. McGee, D.C. Calif. 169 F.Supp. 721, appeal dismissed 80 S.Ct. 90, 361 U.S. 6, 4 L.Ed.2d 52; Bryant v. Harrelson, D.C. Tex., 187 F.Supp. 738; United States ex rel. Morris v. Radio Station WENR, U.S.C.A. 7th, 209 F.2d 105; and Tabor v. Hardwick, U.S.C.A. 5th, 224 F.2d 526." 1/

In its original opinion, this Court held that neither Mulkey v. Reitman, 413 P.2d 825, aff'd 387 U.S. 369 , 87 S.Ct. 1627, nor Griffin v. County School Board of Prince Edward County, 377 U.S. 218, prevented the City "from closing its swimming pools when they cannot be operated economically or safely as integrated pools. . . . [N]either those cases nor any other authority can permit a federal court to require a city to operate public swimming pools when to do so would endanger the personal safety of the City's citizens and the maintenance of law and order." Insofar as racial segregation at the City Jail was concerned, the Court found that appellants lacked sufficient standing to challenge this condition.

1/ Opinion, Pp. 6-7

Because of the bedrock nature of the issues involved and the obvious conflict between the within opinion and others rendered by both the Supreme Court of the United States and by this Court itself, appellants petitioned pursuant to Rules 25a and 29 of the Rules of this Court for a rehearing en banc. On or about October 15, 1967, said petition was granted. Oral argument thereon is currently scheduled for January 10-11, 1968, in Houston, Texas.

Statement of Facts

Affidavits submitted to the court below on behalf of the parties [8] established the following uncontested facts:

1. Appellants are adult black residents, citizens and taxpayers of the City of Jackson.
2. Appellees are, respectively, the Mayor, the Commissioners, the Police Chief and the Director of Recreation of the City of Jackson.
3. Since its formation in 1945, the Department of Parks and Recreation of the City of Jackson has operated and maintained, *inter alia*, public swimming and wading pools.
4. Until May 30, 1963, these public swimming and wading

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[8] See affidavits of Carolyn Stevens (for appellants) and Allen C. Thompson, W. D. Rayfield and George T. Kurts (for Appellees).

pools were operated on a racially segregated basis.

5. In Clark v. Thompson, 206 F.Supp. 539, a declaratory judgment requiring integration of all of the City's swimming and wading pools was entered by the district court in May of 1962.
6. When that decision was affirmed by this Court (313 F.2d 637) and a petition for a writ of certiorari denied by the Supreme Court of the United States (376 U.S. 951), the City, on or about May 30, 1963, closed all of its swimming and wading facilities.
7. In 1964, the City cancelled its leasehold interest in the Leavell Woods Swimming Pool which it had operated on a racially segregated basis since 1960.
8. Although all municipally owned and operated swimming and wading facilities have remained closed to date, they have been continually maintained by the City of Jackson from its tax revenues.

Statement of Law

Prefatory Statement

Appellants will confine their argument to the issue of the swimming and wading pools closed by appellees. In view of the pendency of Lee v. Washington, No. 75 on the current Appellate Docket of the Supreme Court of the United States,[9] the issue of segregation in the City's jails will probably soon be settled in a case which lacks the standing questions raised by both the district court and this Court.[10] However, the principles pertaining to the closed swimming and wading pools are equally applicable to the segregated prison facilities.

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[9] The decision of the three-judge district court holding that (fn. continued on next page)

Specification of Errors

1. The district court erred in dismissing the complaint.

2. The district court erred in refusing to grant the temporary and permanent injunctive relief prayed for in the complaint.

3. The district court erred in holding that appellants had no constitutional right to require the City of Jackson to maintain or operate on an integrated basis previously segregated municipal swimming and wading pools.

4. The district court erred in holding that appellees could constitutionally exercise discretionary judgment on the maintenance or operation on an integrated basis of previously segregated municipal swimming or wading pools.

9/ (cont'd from preceding page)
statutes requiring segregation of the race in Alabama prisons and jails were violative of the Fourteenth Amendment is reported at 263 F.Supp. 327.

[10] In view of the grant of certiorari in Flast v. Gardner, 36 LW 3157, the issue of appellants' standing as taxpayers may no longer be a serious obstacle.

5. The district court erred in holding that appellees could constitutionally close the previously segregated municipal swimming and wading facilities of the City of Jackson because their operation on a racially integrated basis might endanger the personal safety of its citizens, threaten the maintenance of law and order and/or be uneconomical.

Argument

I

THE DECISION IS IN DIRECT CONFLICT WITH THE PRIOR RULINGS OF BOTH THIS COURT AND THE SUPREME COURT OF THE UNITED STATES

A. The closing of hitherto segregated public facilities for the purpose of preventing their operation on an integrated basis has been uniformly held to be state action violative of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Starkly presented, the nub of this case is that the City of Jackson, rather than face the seemingly horrendous propect of black and white bodies bathing together in its swimming pools, has decided to close those facilities. While this may be pointedly analagous to the old saw about cutting off one's nose to spite one's face, it is perhaps the logical last resort of Mississippi's and the City's "steel-hard, inflexible, undeviating, official policy of segregation." United States v. City of Jackson, 318

F.2d 1, 5. Faced with the fall, one by one, of its barriers against "mixing",[11] that state and, in particular, its capital city, are retreating to their final line of defense -- the closing of certain "delicate" public facilities rather than operate them on an integrated basis.

It is not enough to urge, as did the district court, that "[W]here a public facility is closed to members of all races, any issue as to discrimination becomes moot."[12] From every point of view, it is beyond cavil that, under such circumstances, the dominant race does not suffer the same effects, traumatic and otherwise, as beset the dominated one. If any proof of this inescapable and irrefutable fact of life were needed, it can be found in the tragic and irremediable effects on black children created by the closing of the public schools of Prince Edward County, Virginia, in order to prevent, as here, their operation on an integrated basis. See Griffin v. County School Board of Prince Edward County, Va., 377 U.S. 218.

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[11] See, e.g., United States v. City of Jackson, 318 F.2d 1.

[12] This language is more than faintly reminiscent of Mr. Justice Brown's observation in Plessy v. Ferguson, 163 U.S. 537, 551, that "[W]e consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with the badge of inferiority. If this be so, it is not by reason of anything found in the act but solely because the colored race chooses to put that construction upon it."

In recognizing that a county could not close its public schools for any but a constitutional reason, the Griffin court emphasized that "the grounds of race and opposition to desegregation do not qualify as constitutional." (at 232).[13] Given the history of the City's diehard resistance against the integration of its recreational facilities,[14] can it be legitimately or even logically claimed that the closing of its swimming pools does not amount to an open and blatant "opposition to desegregation . . ." To hold otherwise would be to fly in the face of everything this Court has lived with during the past decade.

Only last term, the Supreme Court, in affirming a judgment of the Supreme Court of California, held that the electorate of that state could not constitutionally nullify a grant of equality propounded in several open housing statutes. Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627. In so doing, the Court thoroughly approved the examination by its California counterpart of the "immediate objective", the "ultimate impact" and the "historical context and the conditions existing prior to its enactment" of the offending referendum.[15] A similar analysis here must necessitate a finding that the withdrawal by the City of Jackson of its swimming facilities "would involve the State in [private] racial discrimination to an unconstitutional degree." Reitman v. Mulkey, supra, at 378.

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[13] See also, Hall v. St. Helena Parish School Board, 197 F.Supp. 649, aff'd 368 U.S. 515; Cooper v. Aaron, 358 U.S. 1.

[14] See, Clark v. Thompson, 206 F.Supp. 539 , aff'd 313 F.2d 637 cert. den. 376 U.S. 951.

In Burton v. Wilmington Parking Authority, 365 U.S. 715, the Supreme Court cut through the enervating miasma of the state action concept to find that Delaware had "elected to place its power, property and prestige behind the admitted discrimination"[16] against Negroes by a private restaurant in a state-owned building. Cf. Peterson v. City of Greenville, 373 U.S. 244; Robinson v. State of Florida, 373 U.S. 153; and Lombard v. State of Louisiana, 373 U.S. 273. "'Only by sifting facts and weighing circumstances', (Burton v. Wilmington Parking Authority, supra, 365 U.S. at 722, 81 S.Ct. 856, 6 L.Ed.2d 45) can we determine whether the reach of the Fourteenth Amendment extends to a particular case". Evans v. Newton, 382 U.S. 296, 299-300.

Evans is thoroughly dispositive of the issue before this Court. In the ringing opinion of Mr. Justice Douglas, the attempt to change the character of a park in Macon, Georgia, from public to private for the purpose of excluding Negroes from enjoying its benefits was to "implicate the State in conduct proscribed by the Fourteenth Amendment."(at 302). An attempt to withdraw a previously public park in order to prevent its integrated use is hardly distinguishable from the closing of public swimming pools to obtain the same result.

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[15] Reitman v. Mulkey, supra, at 373.

[16] Id. at 725.

As Mr. Justice Douglas pointed out, "[M]ass recreation through the use of public parks is plainly in the public domain. Watson v. Memphis, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529..." (at 302). In considering the effect of any action concerning such facilities, courts must engage in "'sifting the facts and weighing the circumstances' on a case-to-case basis . . ." Reitman v. Mulkey, supra, at 378. Such cases "exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations." (Id. at 380).

In the instant case, it cannot be denied that the purpose of appellees in closing the municipal pools was solely and exclusively to avoid operating them on an integrated basis. Once this decision had been made, it was a wholly consistent step to the relinquishment of the City's leasehold interest in the Leavell Woods Swimming Pool so that it could then be operated privately on a white-only basis. If Macon could not constitutionally permit this metamorphosis to take place to Senator Bacon's "park and pleasure ground",[17] then Jackson must be similarly enjoined.

Mr. Justice Black's language in Griffin, went straight to the heart of the present issue. "But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place . . . for one reason, and, one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstance, go to the same school." (at 231). The City of Jackson has made the identical determination insofar as its swimming facilities are concerned.

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[17] Evans v. Newton, supra, at 297.

B. The justification that the City of Jackson may close its municipal swimming facilities "when they cannot be operated economically or safely on an integrated basis" is constitutionally invalid.

As early as 1916, and consistently thereafter, the Supreme Court has reiterated that black American citizens cannot be denied the equality and freedom unconditionally guaranteed to them by the War Amendments because their enjoyment of the status might threaten the public peace. Mr. Justice Day's words on this subject are as applicable today as they were when the Supreme Court, in Buchanan v. Warley, 245 U.S. 60, held that "an ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville" which restricted Negroes to the purchase or leasing of real property to blocks which were inhabited by a majority of black people, violated the Fourteenth Amendment. "It is urged", he wrote, "that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."(at 81)[18]

In Cooper v. Aaron, 358 U.S. 1, the Supreme Court, while in total sympathy with the problems of the Little Rock, Arkansas, Independent School District, refused to permit "[T]he constitutional rights of respondents (Negro school children) . . . to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature . . . Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights."[19]

The Court's opinion, written by the Chief Justice and his eight colleagues, was in response to a petition by the School Board and the Superintendent of Schools to postpone their desegregation program "because of extreme public hostility . . . engendered largely by the official attitudes and actions of the

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[18] The Buchanan Court also disposed of appellees' contentions that constitutional rights may be curtailed by the vagaries of economics. "It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results." (at 82).

[19] The anguished objections by officials of the City of Jackson that black and white American citizens who insisted on exercising their constitutional prerogative of riding buses together into that municipality in the spring and summer of 1961 would provoke others to breaches of the peace, was summarily rejected by the Supreme Court. See Thomas v. Mississippi, 380 U.S. 524.

Governor and the Legislature. . . ."[20] The district court granted the petition upon a findings, inter alia, that there were "repeated incidents of more or less serious violence directed against the Negro students and their property . . ."[21] The Supreme Court in affirming a reversal by the Eighth Circuit of the district court's decision,[22] accepted the latter's findings of fact.

In the instant litigation, there is absent the past history of violence and disorder so dramatically present in Cooper. The district court accepted at face value the claims of the Mayor and other public officials of the City that the operation of these pools on an integrated basis would endanger "[T]he personal safety of the citizens of the City . . ." Even assuming, arguendo, this to be the case, the fault lies wholly with the State of Mississippi and the tragic history of its wholehearted encouragement of illegal resistance to any efforts at integration.[23] As the Cooper court put it,"[T]he record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond the unaided power to control is the product of state action. Those difficulties . . .

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[20] Cooper v. Aaron, supra, at 12.

[21] Id. at 13. See also 163 F.Supp. 13.

[22] 257 F.2d 33.

[23] See, e.g., Meredith v. Fair, 305 F.2d 343; United States v. Barnett, 376 U.S. 681, 683-686; and Bailey v. Patterson, 323 F.2d 201.

can also be brought under control by state action." (at 16). The City of Jackson must meet its self-created problems by other means than depriving its black residents of their most fundamental rights.

C. The fact that the closing of the municipal swimming pools denied the use of their facilities to all residents of the City of Jackson cannot justify the abridgement of appellants' constitutional rights.

The district court, in its Findings of Fact, emphasized that "[N]o municipal swimming facilities have been opened to any citizen of either race since said time . . ."[24/] (Opinion of court, p. 3). Based on this factual determination, it concluded that "[W]here a public facility is closed to members of all races, any issue as to discrimination becomes moot." (*Id.*, at p. 4).

The fallacy of this reasoning rests in the fact that the district court is blandly assuming that the closing of public

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[24/] May 30, 1963. Cf. Dawson v. Mayor and City Council of Baltimore, 220 F.2d 386. See also Holmes v. City of Atlanta, 124 F.Supp. 290, aff'd 223 F.2d 93, rev'd 350 U.S. 279; Department of Conservation v. Tate, 352 U.S. 238; Fayson v. Beard, 134 F.Supp. 379; City of Petersburg v. Alsup, 238 F.2d 830; Holley v. City of Portsmouth, Va., 150 F.Supp. 6; Ward v. City of Miami, Fla., 151 F.Supp. 593; Moorehead v. City of Ft. Lauderdale, Fla., 152 F.Supp. 131; Simpkins v. City of Greensboro, 149 F.Supp. 562; Dawson v. City of Norfolk, 159 F.Supp. 642.

facilities has the same effect on both the black and white citizens involved.[25] But, as the Supreme Court so dramatically pointed out in Griffin, the effect of the closing of the public school system in Prince Edward County was infinitely more disastrous to the black children than it was to their white counterparts.[26] In Mr. Justice Black's words:

> Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient. (377 U.S. at 230)

The constitutional infirmity that pervades appellees' action in closing the City's swimming pools is that it amounts to an "affirmative and purposeful state aid promoting private discrimination . . ." Poindexter v. Louisiana Financial Assistance Commission, Civil Action No. 14683, E.D. La., Opinion filed August 26, 1967, at 4. As the Poindexter court declared, "[T]here is no such thing as the State's being just a little bit discriminatory."[27]

In Poindexter, a Louisiana statute which authorized the payment of state tuition grants for any children, black or white, attending "private non-sectarian elementary or secondary schools"[28] was invalidated on the ground that it was "so significantly involved in . . . private discrimination as to render the state action and the private action violative of the equal protection clause." (at 36). In essence, the state was attempting to "induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." Lee v. Macon County, 267 F.Supp. 458.[29] "Any arrangement", Cooper v. Aaron, 358 U.S. 1, that results in state support of segregated facilities must fall as violative of the equal protection clause. Poindexter, supra, at 37.

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[25] See Point ID, infra.

[26] "Irrespective of the terms of a statute, particularly in the area of racial discrimination, courts must determine its purpose as well as its substance and effect . . ." Western Union Tel. Co. v. Foster, 264 U.S. 105, 115.

[27] Id. at 4.

What constitutes "significant forbidden involvement", Poindexter, supra, at 37, may well depend on each particular case. See Anderson v. Martin, 375 U.S. 399 (state law required racial designation for all candidates for public office); Burton v. Wilmington Parking Authority, supra (discriminating restaurant owner leased premises from the state); Reitman v. Mulkey, supra (a constitutional amendment repealed prior legislation forbidding discrimination in housing).

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[28] Act 147 of 1962 (LSA-R.S 17: 2951-17: 2959).

[29] This court can take judicial notice that, due to the enormous nationwide disparity between the per capita annual incomes of white and black families, the latter, with rare exceptions, could no more afford, even with the tuition grants, to enroll and transport their children to private schools even if admission thereto was possible, then they could build swimming pools or join country clubs. In this connection, see Woodward, Origins of the New South, (1951).

Essentially, what is involved here is the same species of "sophisticated discrimination" found so offensive by Mr. Justice Douglas in his concurring opinion in Mulkey.[30] The City of Jackson, by closing all of its municipal swimming facilities, followed by its relinquishment of its leasehold interest in Leavell Woods Park, was, in practical effect, instructing those of its white residents who wanted to swim how to get back into the segregated waters. Its action is, in every sense, a classic attempt to "harness the energies of private groups [31] to do indirectly what they cannot under our decisions allow their government to do." 387 U.S. at 383.

In the last analysis, the closing of the municipal pools left the City's black residents without any safe public bathing facilities while encouraging its white population to provide acceptable private substitutes. Clearly, appellees can be "charged . . . with encouraging, rather than commanding discrimination." 387 U.S. at 375. The net result was the total deprivation of public swimming facilities as far as black Jacksonians were concerned while white residents were, at worst, only temporarily inconvenienced and, at best, enjoying the pleasures of the Leavell Woods Pool or those at their country club or in their own or their neighbor's backyards.[32]

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[30] Reitman v. Mulkey, supra, at 383. "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." Smith v. Texas, 311 U.S. 128, 132.

[31] Such as the Southwest Branch of the Young Men's Christian Association.

[32] This Court's decision affirming the action of the Board of
(fn. cont'd on next page)

D. Appellees have an affirmative duty to take each and every step necessary to fulfil the unconditional guarantees of freedom and equality incorporated into the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

In a landmark decision, this Court has recently held that, in the field of public education, there is an "affirmative duty of the state to furnish equal educational opportunities." *United States v. Jefferson County Board of Education*, 372 F.2d 836, 848. In declaring that "courts in this circuit should give 'great weight' to HEW Guidelines"[33] 372 F.2d at 847, Judge Wisdom left no room to doubt this Circuit's utter commitment to "the affirmative duty of states to furnish a fully integrated education to Negroes as a class." *Id.* at 846-7.[34]

(fn. cont'd from preceding page)

Commissioners of Montgomery, Alabama, in closing that City's public parks on January 1, 1959, not only preceded by many years *Griffin*, *Mulkey* and The Civil Rights Act of 1964, but it reflected a painful reluctance to place the federal stamp of approval on the step taken by the Board. *City of Montgomery v. Gilmore*, 277 F.2d 364.

[33] The Guidelines of the United States Office of Education, Department of Health, Education and Welfare. See also, *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729.

[34] See, 380 F.2d 385, in which *Jefferson County* was affirmed *en banc*. "The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated unitary school system in which there are no Negro schools and no white schools--just schools." (at 389).

In putting its finger on the very core of the problem, this Court stated:

> Brown's broad meaning, its important meaning, is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Amendments created in favor of Negroes. This is the right of Negroes to national citizenships, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. Brown erased Dred Scott, used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution. Freedmen are free men. They are created as equal as are all other American citizens and with the same unalienable rights to life, liberty, and the pursuit of happiness. No longer 'beings of an inferior race' -- the Dred Scott article of faith--Negroes, too, are part of 'the people of the United States'.
>
> A primary responsibility of federal courts is to protect nationally created constitutional rights. A duty of the States is to give effect to such rights--here, by providing equal educational opportunities free of any compulsion that Negroes wear a badge of slavery. The states owe this duty to Negroes, not just because every citizen is entitled to be free from arbitrary discrimination as a heritage of the common law or because every citizen may look to his state for equal protection of the rights a state grants its citizens. As Justice Harlan clearly saw in the Civil Rights Cases (1883), 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, the Wartime Amendments created an affirmative duty that the States eradicate all relics, 'badges and indicia of slavery' less Negroes as a race sink back into 'second-class citizenship. 372 F.2d at 872-73.[35]

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[35] For a penetrating analysis of the "affirmative duty" concept, see Judge Wright's compelling opinion in Hobson v. Hansen, 269 F.Supp. 401.

In his article, The Constitutional Right of Negro Freedom,[36] Professor Kinoy has emphasized the origin and significance of this nation's "affirmative responsibility to eliminate slavery, its badges and indicia, as well as the foundation of racial inferiority upon which it rested".[37] One of the "badges and indicia of slavery"[38] was, of course, the denial to black people of any participation in or enjoyment of the leisure-time pursuits of the dominant race. Whether the activity in question was swimming or learning to read and write, the exclusion was a total one.[39] In either situation, "the Wartime Amendments created an 'affirmative duty' that the States eradicate all relics, 'badges and indicia of slavery' lest Negroes as a race sink back into 'second-class' citizenship" 372 F.2d at 873.

It is not enough to declare Dred Scott dead and then permit his spectre to walk the land. If he was indeed a "being[s] of an inferior order,[40] . . . subjugated by the dominant race", then his post mortem rehabilitation had to be as complete as his prior degradation. "As a free and equal participant in the political community of the United States, [he] was entitled to all the privileges, rights and immunities which hitherto only white 'people of the United States' enjoyed."[41]

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[36] Rutgers Law Review, Vol. 21, No. 3, Spring, 1967, 387-441.

[37] Id. at 440.

[38] Mr. Justice Harlan's dissenting opinion, Civil Rights Cases, 109 U.S. 3, 30-36.

[39] See Eaton, The Growth of Southern Civilization, 1790-1860, at 77-78 (1961).

[40] Scott v. Sandford, 60 U.S. (19 How.) 393, 404-05.

The right to swim on a non-segregated basis may not, in the great scheme of things, have the lasting significance of the right to "a fully integrated education,"[42] but it can scarcely be denied that it is one which white Americans traditionally enjoyed. "If white men, generally, enjoyed a right or privilege in any area of life, black men could not be denied such right or privilege because of their race."[43]

This is precisely the national right created by the Wartime Amendments and so decisively proclaimed by Mr. Justice Harlan in his historic dissent.[44] Or as Professor Kinoy puts it, "[T]his right of the Negro to be free from any discrimination by reason of race or color in the exercise of rights or privileges hitherto enjoyed by white men has been affirmatively created by the nation in the enactment of the Thirteenth and Fourteenth Amendments. It is a right without which the freedmen would sink back into the former status of slavery,[45] and it is, therefore, a right crucial to the full achievement of the stated fundamental national objective--the permanent elimination from American life of the institution of human slavery and all of its pervasive influence."[46]

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[41] Kinoy, op. cit, at 393. 109 U.S. 3, 30-36.

[42] 372 F.2d at 846-7

[43] Kinoy, op. cit, at 394.

[44] 109 U.S. 3, 33-35.

[45] 372 F.2d at 873.

Quite apart from its obvious traumatic effect on the black citizens of Jackson, the closing of the City's swimming pools to avoid their court-ordered integration is nothing short of a refusal to remove a badge of slavery. It is a tragic reaffirmation to the black people of Jackson in particular and the United States in general that they remain, in the eyes of their white compatriots, the same "beings of an inferior order"[47] they were considered to be a century ago.

Under such circumstances, the courts of the United States must, as this Court has so firmly stated "grasp the nettle."[48] As Judge Wright has just reminded us in Hobson v. Hansen, *supra*, at 517:

> "It would be far better indeed for these great social and political problems to be resolved by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance."

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[46] Kinoy, *op. cit*, at 394.

[47] Scott v. Sandford , 60 U.S. at 404-5.

[48] 372 F.2d at 849.

II

CONCLUSION

The judgment below insofar as it pertains to the municipal swimming and wading facilities of the City of Jackson should be reversed and the district court directed to issue a permanent injunction requiring appellees to operate the said facilities on an integrated basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the above and foregoing brief have been served on the attorneys for the appellees by the United States mail, pre-paid postage, this 30th day of November, 1967.

William M. Kunstler
One of the Attorneys for Appellants

[illegible] TAFT, GEORGE, G. [illegible] TALLAHASSEE
[illegible] DECISION)

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APR 9 1965

April 8, 1965

Carl Rachlin, Esq.
38 Park Row
New York, N. Y.

Dear Carl:

I am enclosing a draft of the complaint in the action re the pools in Tallahassee, Florida. Paragraphs 4 through 8 constitute factual allegations which are probably inaccurate since I do not have the details of the situation in Tallahassee. Paragraphs 1 through 4 represent the required jurisdictional allegations.

While I have enclosed a complaint to be used in a new action an alternate method of procedure would be a supplemental complaint in the previous action which resulted in an order to desegregate the pools. A new action would be tried before a three-judge court pursuant to 28, U.S.C. 2281. A supplemental complaint would be heard before a one-judge court as part of the already pending action.

This latter procedure was followed in the case of Griffin vs. County School Board of Prince Edward County, 84 S. Ct. 1226, 1964. In that case the court specifically struck down the objection raised by the school board that a three-man court should have heard the new supplemental complaint.

Aside from the procedural question there are certain substantive issues about which I have misgivings. An attempt to obtain an order requiring the maintenance of the pools represents a step beyond any previous position of the courts. For example, in the case of Tompkins vs. The City of Greensboro, N. C., 162 F. Supp. 549, opinion supplemented 175 F. Supp. 476 aff'd 276 F. 2d, 890, the Court of Appeals, 4th Cir. 1960, the Court of Appeals specifically upheld the right of the City of Greensboro to sell its pool facilities to a private corporation which would then operate them on a segregated basis. The court merely examined the transaction to determine whether or not this was a bona fide sale in spite of the fact that the organizer of the purchasing group was an official of the city.

As dicta the court specifically stated that there was no question of the right of the city to close the pools. This decision has been cited on several occasions, including the case of Greensboro vs. Simkins, 140 F. Supp. 562 aff'd 246 F. 2d, 425.

Of course, that recent case of Griffin vs. County School Board of Prince Edward County is some indication that the Supreme Court might be leaning in our direction. However, this case still stands for the limited proposition that a local government cannot circumvent the ruling of the court by operating the school facilities through a nominal private corporation but, in fact, with state funds. In Prince Edward County the so-called private schools were supported in part by "voluntary contributions", by local residents who were then allowed to deduct said contributions from their real estate taxes. The balance of the funds came from tuition grants made out of the general treasury of the county and state which were given to the pupils who then gave them to the school.

There is, however, one aspect of the Prince Edward case which may be useful to us. The court did not merely base its order on a factual finding that the private schools in Prince Edward County were public schools by another name but, rather, the court held that public schools of Prince Edward County could not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the State of Virginia permitted other public schools to remain open at the expense of the taxpayers. To quote the court,

> "For reasons stated we agree with the District Court that under the circumstances here, closing the Prince Edward County schools while public schools of all other counties of Virginia were being maintained, deny the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the 14th Amendment".

I think we can utilize this reasoning. If we can demonstrate that the pools in question are part of a general recreational program supported by general treasury funds many of which are segregated, either legally or de facto, we can then argue that the city cannot close these facilities which were ordered desegregated while maintaining the other facilities.

We will, of course, be met with the argument that the pools are separate entities and that the Prince Edward case, at least by inference, would have permitted the closing of all the schools of Virginia (which I doubt).

All in all, it is an intriguing proposition. The above analysis only touches upon the most obvious points. I think in this particular case, however, special attention must be paid to the specific factual allegations since the questions of good faith and the question of whether or not the pools are separate entities or part of a general recreational program may very well be crucial.

Please do not hesitate to give me a ring if you wish to discuss the matter further.

Yours truly,

Dave R Weisman

David R. Weisman

drw:rd
encl.

April 11, 1965

John Due, Esq.
540½ W. Brevard St.
Tallahassee, Fla.

re: Swimming Pools in Tallahassee

Dear John,

Please excuse the typing, but I am doing this myself, since it is Sunday and the NAC is meeting in the next room. I enclose a proposedcomplaint with regard to the swimming pools. Feel Free to change it in any way you see fit. I hope you can use it promptly.

The leading case in your favor is Griffin v County School Board of Prince Edward County, 84 S.Ct. 1226, 1964. You might also want to read a case against us, at least partially against us anyway, Tonkins v City of Greensboro, 62 F. Supp. 549, opinion supplemented 175 F. Supp. 476, aff'd 276 F. 2d 890.

I'll be in touch with you on this, but begin it right away if you can. Take care of yourself, love to Le/

Carl

Matthew Fla
Swimming
Pool

CORE SCHOLARSHIP, EDUCATION and DEFENSE FUND
540½ West Brevard St. Tallahassee, Florida

JOHN D. DUE, Jr.
FLORIDA COUNSEL

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[redacted]17[redacted]

May 16, 1965

Mr. Carl Rachlin
General Counsel
CORE
38 Park Row
New York 38, New York

Dear Carl,

Enclosed is a draft of the swimming pool suit. Please make any corrections, additions, etc., and telephone them to us first thing Monday.

The estimated cost for filing and Marshalls fee is $92.64. Since we have only recently received our March expense reimbursement, our budget will not allow an expenditure of that amount, at this time. Therefore will you please telegraph at least that amount, so that we may file this suit on Monday.

Also enclosed is a copy of the proposed contract relating to this case. Let us know if it meets with your approval.

Yours truly,
Le Faucette
Le Faucette

enclosure

Spoke to
Jim asked him
and OKayed it

Spoke to
Faucette — Sachs
and asked for
check for the
amt
5/17/65

Tallahassee

MAY 2 8 1965

LAW OFFICES
LAWSON, REYNOLDS, NESBITT & CHAIKIN
701 RCA BUILDING
1725 K STREET, N. W.
WASHINGTON 6, D. C.
FEDERAL 8-5870

BELFORD V. LAWSON, JR.
ARTHUR M. REYNOLDS
LEROY NESBITT
DONALD J. CHAIKIN

OF COUNSEL
SEYMOUR M. LAZAR
8730 SUNSET BOULEVARD
LOS ANGELES, CALIFORNIA
OL-4-4430

27 May 1965

Mr. Carl Rachlin
General Counsel
CORE
38 Park Row
New York City 38, N. Y.

Dear Carl:

All I received from Tallahassee was a copy of the letter which Le Faucette sent to you dated May 21, 1965.

I await further developments.

Sincerely,

Mike

Michael D. Padnos

MDP:m

June 25, 1965

Hon. John Doar, Esq.
Justice Department
Civil Rights Division
HOLC Bldg.
101 Indiana Avenue, N. W.
Washington, D. C.

Dear John:

We are presently writing a brief opposing a motion to dismiss in the case seeking the reopening of three Tallahassee, Florida municipal swimming pools which were closed by city officials on July 4, 1964 two days after the effective date of the Civil Rights Act of 1964. I think you will find the complaint interesting and important.

A decision in our favor will be highly significant in community life. The technique of closing municipal facilities is not only an evasion of public obligations to desegregate under the law and a violation of the Constitution but is detrimental to community health, welfare and safety. Although I realize that public facilities have been distinguished from educational services, viz., Prince Edward County case, I strongly feel that such facilities are important adjuncts to the educational process in any community -- because of them youth have constructive, healthy ways to spend their time; their play is educational.

Cont'd...

Moreover, the arbitrary exercise of "freedom" to close such facilities by municipal officials deprives Negroes of their guaranteed rights to use such facilities, hampers the lawful process of desegregation in the community, and serves as a hovering threat: if you try to enforce rights and obtain access on a desegregated basis, the facilities will be taken away.

The closing of Tallahassee's swimming pools can seriously inhibit the process of desgregation in other facilities, such as parks, because of fear of losing them entirely.

I am enclosing the complaint submitted in the case. Your thoughtful consideration will be appreciated.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs
Enc.

cc: John Due, Esq.

CORE SCHOLARSHIP, EDUCATION and DEFENSE FUND (1965) [June 28?]
540½ West Brevard St., Tallahassee, Florida

John D. Due Jr.
Florida Counsel

To: Whoever is researching the Tallahassee swimming pool suit.
Re: The information requested concerning The Tallahassee Charter, and pertinent ordinances

--You will find enclosed all that could be culled from the recorded ordinances and the charter. Please keep in mind that the bad guys have filed a motion to dismiss. No time has been set for hearing on the motion but we may well have to show up on very short notice. Also we are assuming that you know of our intention to file a motion for a preliminary injunction (ourprayer for temporary relief having been ignored)----soon.

--You might also be interested in the procedure used to close the pool. There seems to have been no ascertainable procedure! ~~We have~~ The city is run on a manager/commission plan. We searched the minutes of the commission ~~for~~ from the time of the ~~closing~~ attempted entrance by defendants ~~to~~until this month and have been able to find no references to the swimming pool except for an approved transfer of funds in Dec. to cover "salaries"($500), and "materials"($3000).

--The manager, when interviewed (as it is laughingly called), insisted that all official records of the city were held by the auditor. The auditor's office was only able to produce the Commission's minutes referred to above. The manager then refused to provide our investigator with further information regarding the closing of the pools although he was willing to comment in passing on a number of other things and did so with a gusto (the investigator's parentage, etc.).

--As nearly as can be ascertained, the manager ordered that the pools be closed; his order may or may not have ~~had/some~~ been authorized or recorded; and the matter was never raised before the Commission.

--

QUESTIONS:

- Should we try to learn the nature of the order before the hearing through discovery processes before the hearing?
- If we would gain from pre-hearing discovery should we use discovery or interrogatories (i.e. will it be worth the cost of discovery procedures to make him answer orally and perhaps reveal a violation of his authority, etc., or should we instead settle for the vague answers of the city's attorneys?)
- ~~Does~~ Is the procedure ~~worth~~ (used in closing the pools) worth exploring at all.
- Who killed Cock Robin?

Our other problem is ~~this~~the one of which you have been notified by phone. In the Tompkins case (162 F.Supp 549), Motley and Marshall (who were on the brief) made a curious decision about ~~appeal~~the appeal. Why did they only appeal the "bona-fideness" of the transfer? Had they given up the main issue as hopeless? Did they ~~see~~ foresee an unfavorable result and wish to preserve the point for a more favorable situation or court? Can the briefs be located and sent to us? Does any one know either of them ~~to~~ well enough to ask?

We are expecting:1) the answers to the above questions, 2)information concerning our projected answer to their motion to dismiss, 3) advice on our motion for a preliminary injunction, ~~4)~~ and 4) the research done on the case. If possible, we'd like to have #1 in two or three (maximum) days.

John Due Jr.
John Doe Jr. (ts)

TALLAHASSEE CODE:

Chapter 18 (health and sanitation), article V (§45-50)

§18.45 Scope (to public/private pools)
46 Fences specifications
47 Locks
48 Mesh
49 Exceptions
50 Penalties

Chapter 2, §19 Article III (City Park Board)

advisory boards

§2.19 Organization of Park Board....3 members (recommended by the Tallahassee Garden Club)

20 Duties....to recommend/plan (in an advisory capacity) with a view toward beautification)

Chapter 2, §19 Article IV (Recreation Board)

§2.26 the sameas Park Board

TALLAHASSEE CHARTER:

§43 The city managaer shall manage and control all city owned public utilities operated and managedby the municipality, and the office ofthe city manager shall be charged with the management and operation of all public works and to regulation (sic) by ordinances of the city commision all charitable andcorrectional institution and agencis of the city, enforce all laws, ordinances and regulations relative to the preservation and promotion of public health; shall manage or inspect water, lighting, heating, power and ~~p~~ transportation enterprises of the city; shall manage and control the use, construction, improvement, repair, and maintenance of all recreational facilities of the city, including parks, play grounds, and public gymnasiums, and social centers...........

TALLAHASSEE CHARTER (con't)

§207 That the city of Tallahassee in Leon County, Florida, is hereby authorized to acquire, construct, extend, operate, and maintain a city hall, ...swimming pools,municipal auditoriums and civic centers.......and to acquire such sites as maybe necessary for any of said utilities or facilities and to acquire, construct, or extend building f for the operation thereof.

§7 "Powers of the city generally"

........shall have ~~t~~ full power and authority to acquire, take, hold, control and dispose of property, real,personal and mixed, both within and without its corporate limits for the use, benefit, welfare and best interest of said municipality, by purchase, lease........

§290
s

"Property generally"

Authority is hereby granted to and conferred upon the city of Tallahassee to acquire, take hold, control and dispose of real property with its corporate limits by purchase, lease, grant and condemnation or eminent domain proceeding, for the use by said city ....as public parks and for public park purposes......

this has been rewritten with the sarcasm and
snide asides deleted.

[1965]

June 28,

Dear Miss Heft,

I should like to apologize for failing to have provided you with the information which you requested in ~~the~~ your letter of June 17th. I arrived after your letter and did not receive it until today. I was therefore working from an incomplete memo (your phone call?). I am still confused as to the roles to be played by those of us here in preparing the swimming pool case. ~~There is~~ I cannot tell what is to be done more than answering your questions. Carl Rachlin's call, by the time I received it, was ......well puzzling. Hadn't those briefs been consulted? Was our suggestion that they be checked improper? ~~###~~Are we on the same side? I'm afraid that I ~~###~~still do not really appreciate that aspect of the request which was improper.

Won't you write telling me just what you wish done...and what is expected of us? Instructions from the castle in New York, if internally consistent, would be......welcomed and far more efficient than the divinations of intent which must be made ~~through~~ rather unscientifically now.

Further information on the swimming pool: It was financed by a bond issue of the "standard type", floated under the authority of the City Commission. I can check the local records for other specific information...and shall/now that I have your letter.
do so

Iassume your personal confidence ~~but/In~~ regarding the above ~~and~~(he added naively) and suggest that future correspondence be addressed to me, or at least referred to me on the envelope.

Ted Striggles

Ted Striggles

Fla. Swimpools

July 6, 1965

Mr. T. Striggles
c/o CORE SEDF
540½ W. Brevard St.
Tallahassee, Florida

Dear Mr. Striggles:

In response to your letter of June 28, Mr. Rachlin has already spoken to Mr. Due concerning the Tallahassee brief and it is being fully taken care of by our office except for any local data unavailable in New York libraries.

Thank you for the concern expressed in your letter.

Very truly yours,

CAROLYN HEFT
Assistant to
Carl Rachlin

CH/csh

P.S. I have checked with the NAACP and read the Tompkins brief, and all(or most) other briefs in apperently conflicting cases. I think we have some good arguments coming up. A long letter will follow answering the question put by Mr. Due in his long letter - after consultation with Mr. Rachlin who has been in North Carolina to date.

JUL 27 1965

LAW OFFICES
RICHARD, BRIAN & DISANTI
209-11 MCCLATCHY BUILDING
69TH & MARKET STREETS
UPPER DARBY, PA.

HOWARD RICHARD
JACK BRIAN
ALEXANDER A. DISANTI

N. HORACE BERMAN
(1922-1958)
FLANDERS 2-5420
2-5421
JACKSON 8-5065
8-5066

July 26, 1965

Carl Rachlin, Esq.
Congress of Racial Equality
38 Park Row
New York, N. Y. 10038

Dear Carl: Re: Tallahasee, Florida

We were disappointed that you did not arrive in Tallahasee as planned last week. A report on the Swimming Pools case and other matters was not sent to the New York office, pending your arrival in Florida. Since I did not get an opportunity to talk to you, personally, I am forwarding these comments.

With respect to the Swimming Pools case, Judge Carswell dismissed the suit and an appeal was promptly taken to the Fifth Circuit Court of Appeals. A copy of the brief submitted in conjunction with oral argument before Judge Carswell is in the file in John Due's office, along with copies of all the record papers. If possible, I would very much like to argue this case on appeal.

I also prepared, at John's direction, a suit to compel the opening of the Board of Registration Office, in Gadsden County for more than one day a week, which is the current practice. This suit was ready to be filed and we attempted to reach you in New York and New Orleans to obtain a sufficient sum to cover the filing costs, etc., but at my departure from Tallahasee, you were still unavailable. I urge that this suit be commenced promptly as I think it will have a far reaching effect if successful.

During my stay in Tallahasee, I also became interested in a possible suit on behalf of tobacco workers in that area for involuntary servitude. I learned that in many areas in the tobacco growing region, negro farm workers are disciplined by being thrown on a road gang without a formal charge, process or any hearing whatsoever. This is an appalling condition that requires a good deal of investigation to lay the foundations of a successful suit. I would strongly urge action in this area.

I have discussed these various matters with John Due but felt it was desirable to bring them to your attention personally as well.

Sincerely,

JACK BRIAN

JB:FCM

Jail - Swimming pool

CORE SCHOLARSHIP, EDUCATION and DEFENSE FUND

540½ West Brevard St. Tallahassee, Florida

JOHN D. DUE, Jr.
FLORIDA COUNSEL

Phone 222-2317

August 2, 1965

Carl Rachlin
General Counsel, CORE
38 Park Row
New York 38, New York

Dear Carl,

Enclosed you will find a copy of amended designation of record, being filed and served today in the Steele v. Taft (Swimming Pool) case. Original designation merely said "the entire record." This seemed ambiguous to me, and since it was only placed on file this morning, no time is lost by clarifying.

Rules allow opposing counsel ten (10) days in which to serve a cross -designation, so it will be impossible for the appeal to be docketed before then. However, I have requested that the clerk have everything ready to go at that time. Appeal is on the original papers, so there will be little excuse for delay after the ten days has run.

Yours truly,

DH

David Halperin

DH/sj

P.S. Ambiguity mentioned [illegible] the Clerk.
DH

Enc. 10.00 donation
From: John Due

August 4, 1965

Jack Brian, Esq.
Richard, Brian & De Santi, Esqs.
69th & Market Streets
Upper Darby, Pennsylvania

RE: *Tallahassee Swimming Pools*

Dear Jack:

I regret not seeing you in Tallahassee, but Marvin Rich took quite sick and so I postponed my trip for one week in the hopes he would be better, but unfortunately he could not come, and so I went to Tallahassee myself.

As to the case 1) we have appealed 2) we have made the designation of the record 3) we have made a motion for emergency hearing 4) we are furnishing a new brief putting together all arguments.

By the way, the garbling over the telephone prevented you people from understanding the significance of *Darlington*. *Prince Edward County*, important as it is, is nevertheless a school case and so has attached to it the special significance of school cases. But *Darlington* shows the power of the court to order a reopening, where there was no specific statutory authority, of a business operation.

Mr. Wadsworth told me there was not likely to be cross argument in view of our request for an emergency hearing.

I hope to see you soon.

Sincerely,

CARL RACHLIN
General Counsel

CR/es

cc: John Due, Esq.
Marvin Rich

Tallahassee

CORE SCHOLARSHIP, EDUCATION and DEFENSE FUND
540½ West Brevard St. Tallahassee, Florida

JOHN D. DUE, Jr.
FLORIDA COUNSEL

Phone 222-2317

AUG 9 [illegible]

August 5, 1965

Carl Rachlin
General Counsel, CORE
38 Park Row
New York 38, New York

Dear Carl, Answering your letter of 8/5/65:

Record on Appeal will be sent to the 5th Circuit on original papers. I designated everything in writing I could think of, so the Clerk would not fool around sorting out some papers to send and others not to send. I wanted to clearly eliminate, however, any transcript of the argument (and testimony, if any), since that would cause unnecessary delay and expense. Naturally, the 5th Circuit will rely upon the briefs submitted on appeal, and will ignore briefs filed in the District Court.

I have not had an opportunity to discuss the Barnes case with John Due. The case is assigned to Bruce Grinnell to work up more facts.

Re. St. Augustine school desegregation case: I talked to Judge Simpson about this by phone today. He deliberately held off any action last summer; he has recently asked for reports on the extent of voluntary desegregation, and indicated he will begin pressing this without any formal action on our part at this time.

Best regards,

David J. Halperin

DJH/skj

Leon Swim- Pool

August 5, 1965

David Halperin, Esq.
c/o CORE Scholarship, Education & Defense Fund
540½ W. Brevard Street
Tallahassee, Florida

Dear Dave:

Thank you very kindly for the amendment to the designation in the swimming pool case. We seem to have gotten ourselves fouled up for no good reason on several previous occasions, in this case. I hope the swimming is good in the Fall or maybe we should have a Christmas swimming party in Tallahassee; the ice is only very thin.

By the way I am a little curious to know why you designated the brief as part of the record, particularly since we are going to have to submit a new brief anyway. As you perhaps know, because of Judge Carswell's vacation plans the argument was scheduled on two days notice. As a result, we in the North were caught a couple of days short on our brief and it was read in draft form over the telephone without the benefit of my editing (?). It came through rather badly and I am afraid the fellows in Tallahassee did not get the significance of several points. They made concessions that should not have been made and they misunderstood the significance of some of the cases, and also over-played the *Prince Edward County* case. Our brief for the Court of Appeals I trust will take care of all these points, and I think we should win the case.

With kindest regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

P. S. What does John think of the Clenton Barns matter? since it will be his responsibility or that of anyone with him to follow up on this ?

Cont'd...

P. S. (Cont'd)

I am apposed to making any direct appeal to the Attorney General since the case will undoubtedly get delayed and swallowed there for an interminable period of time. I wish you would advice the people in Tallahassee of this. As soon as I have a chance to go over these affidavits in more detail I will discuss them with you people further.

cc: Henry Schwartzchild, Esq.

August 10, 1965

George Wiley
CORE
38 Park Row
New York 38, New York

Dear George,

Have you been able to see the reports that I send to Carl Rachlin, or should I send you copies directly?

Yours truly,

John D. Due, Jr.

John D. Due, Jr.

JDD/sj

Tallahassee

AUG 30 1965

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113

TELEPHONE
523-5197

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

August 27, 1965

COPY

James O'Dea, Esq.
C.O.R.E. Scholarship, Education
and Defense Fund
540½ West Brevard Street
Tallahassee, Florida

Dear Mr. O'Dea:

I respond to your letter of August 24, 1965, requesting the filing of certain papers in the Steele Case. We no longer have the originals of the papers which you sent, which were destroyed by us when we were informed that a different procedure was going to be followed. We return herewith the copies you sent.

If you now intend to go forward on the motion, it is not necessary to do that through this office. You should, rather, send the papers directly to the Clerk of the Court of the Fifth Circuit Court of Appeals, sending us a carbon. This is the proper procedure as to all such cases.

We regret the misunderstanding about these papers,

Respectfully,

COLLINS, DOUGLAS & ELIE

BY: CRS
CAROL RUTH SILVER

CRS/ew

cc. Carl Rachlin, Esq.

Enclosures:

September 21, 1965

John Due, Esq.
CORE SEDF
540½ W. Brevard Street
Tallahassee, Florida

Re: Steele v. Tallahassee

Dear John:

This latest from Judge Carswell is outrageous. You must submit a request for a writ of mandamus to the Fifth Circuit immediately.

They are treating us like fools. Please get on this without delay.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

cc: M. Rich

REQUISITION FOR CLERK'S FEES

$35.00
Sent to John Due,

J. Collins
S. Pope

OFFICE OF THE CLERK

United States Court of Appeals

FOR THE FIFTH CIRCUIT

New Orleans 30, La., **October 22, 1965**

Messrs. John D. Due, Jr. & Bruce Rogow
504½ West Brevard Street
Tallahassee, Florida

Dear Sir:

This is to advise that an initial deposit of TWENTY-FIVE DOLLARS is required for account of Clerk's fees in the case of

ROCHELLE STEELE, ET AL.,

Appellant,

VS.

GEORGE B. TAFT, ET AL,

Appellee.

Please remit in Exchange on New York or New Orleans, or by Postal or Express Money Order. Personal checks will not be received as cash.

EDWARD W. WADSWORTH,
Clerk.

By Lydia Comberrel
Deputy Clerk.

NOTE.—No case will be filed and docketed until sufficient deposit to cover Clerk's fees is made.

Lawyers' Committee for Civil Rights Under Law
233 North Farish Street
Jackson, Mississippi 39201
Telephone: 948-5400

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* *Member of Executive Committee of the Board of Directors*

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Berl I. Bernhard

Washington Office
Suite 1035
1875 Connecticut Avenue, N.W.
Washington, D. C. 20009

Chief Counsel
Richard E. Tuttle

Assistant Counsel
John H. Doyle, III

November 27, 1965

NOV 29 1965

Carl Rachlin, Esquire
General Counsel
Congress of Racial Equality
West 46th Street
New York City, New York

In re: Steele v. the City of Tallahassee

Dear Carl:

As I mentioned during our telephone conversation recently, we have two pending cases in the District Courts which involve the same issues raised on Appeal in the above case. I would very much appreciate your sending to me any available copies of briefs or other pleadings in this case. They would be very helpful to me in determining how to dispose of the cases we have already filed.

If you incur any costs in the duplication of any of the materials, please bill our office here in Jackson for them.

With best personal regards,

Sincerely yours,

Jack

John H. Doyle, III

bj

The Committee was formed at the request of the President of the United States.

November 30, 1965

John H. Doyle, III
Assistant Counsel
Lawyers' Committee for Civil
 Rights Under Law
233 North Farish Street
Jackson, Mississippi

Dear Mr. Doyle:

We are presently redrafting our brief in Steele v. City of Tallahassee. I expect that the final draft will be finished by the end of next week. At that time we will be happy to send you a copy.

Thank you very much for your inquiry.

Very truly yours,

SMN/cs

STEPHEN M. NAGLER

Lawyers' Committee for Civil Rights Under Law
233 North Farish Street
Jackson, Mississippi 39201
Telephone: 948-5400

DEC 21 1965

December 18, 1965

Chief Counsel
Richard E. Tuttle

Assistant Counsel
John H. Doyle, III

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- * John W. Wade

** Member of Executive Committee of the Board of Directors*

Executive Director
Berl I. Bernhard

Washington Office
Suite 1035
1875 Connecticut Avenue, N.W.
Washington, D. C. 20009

Steven M. Nagler, Esquire
Congress of Racial Equality
38 Park Row
New York 38, N. Y.

Re: Steele v. City of Tallahassee

Dear Mr. Nagler:

Thank you for your letter to me of November 30, 1965, advising that you are redrafting your brief in the above case. As we have filed two cases posing the same issue which will come up for trial in Vicksburg on February 3, I am anxious to have any materials that would indicate the issues raised in your case and the present posture of it.

I would prefer to postpone going to trial in our cases until the Steele case is decided by the Fifth Circuit and would like to have sufficient facts on Steele to permit me to enter a stipulation to this effect with opposing counsel.

I would therefore appreciate your sending down to me any available copies of drafts of the brief, or pleadings previously filed, with a notation of the present status of the case and the issues before the Fifth Circuit. If you would wish any of the materials returned, please so indicate and we will be happy to return them promptly, as well as to reimburse you for any costs of duplication or handling.

With sincere thanks for your assistance,

Yours very truly,

John H. Doyle

John H. Doyle, III

JHD:sbs

The Committee was formed at the request of the President of the United States.

LAWYERS CONSTITUTIONAL DEFENSE COMMITTEE
OF
THE AMERICAN CIVIL LIBERTIES UNION
SOUTHERN OFFICE
603 NORTH FARISH STREET, JACKSON, MISSISSIPPI 39202
(601) 948-4191
ALVIN J. BRONSTEIN, STAFF COUNSEL

January 18, 1966

JAN 20 1966

Carl Rachlin, Esq.
CORE
38 Park Row
New York, N. Y.

Re: Steele v. Taft
Court of Appeals No. 23125

Dear Carl:

In connection with our Canton Park case which is presently in the 5th Circuit, I have just obtained an order from the Court granting me until 30 days after the Court's decision in the Steele Case to file my brief. I would appreciate your forwarding me a copy of your brief at your early convenience.

Sincerely,

Alvin J. Bronstein

AJB:jb

February 2, 1966

Alvin J. Bronstein, Esq.
LCDC
603 N. Farish Street
Jackson, Mississippi

Dear Mr. Bronstein:

Enclosed please find copy of the Tallahassee brief, Steele v. Taft, which has not yet gone to the printer, as we are awaiting information from the Fifth Circuit.

Please excuse the delay.

Sincerely,

Charlaine Shelto
Sec. to Carl Rachlin

/cs

February 2, 1966

J. Gelb, Esq.
Rosenman, Colin
575 Madison Avenue
New York, New York

Dear Mr. Gelb:

Enclosed please find a copy of the Tallahassee brief, Steele v. Taft, which has not yet gone to the printer, as we are awaiting additional finformation from the Fifth Circuit.

Please excuse the delay.

Sincerely,

Charlaine Shelto
(Sec. to Carl Rachlin)

/cs

February 9, 1966

John Doyle, Esq.
Lawyers' Committee for Civil
Rights Under Law
1875 Connecticut Avenue, N.W.
Washington, D. C.

Dear Mr. Doyle:

Enclosed is a copy of the Tallahassee brief, Steele v. Taft.

Please pardon the delay.

Sincerely,

Charlaine Shelto
(Secretary to General
Counsel)

/cs

Zall

February 10, 1966

Alvin J. Bronstein, Esq.
LCDC
603 N. Farish Street
Jackson, Mississippi

Dear Al:

Thank you very much for Mark Howe's memoranda concerning the closing of a public facility. I am sending Mark a copy of this letter and a copy of the brief we propose to use in our Tallahassee swimming pool case, for his thoughts. I have only read and I regret to say, somewhat hastily, the two memoranda but I find myself a little unpersuaded by the statutory references to Title II of the 1964 Civil Rights Act. There is no doubt that Section 203 makes it illegal to prevent anyone from exercising a right under Sections 201 and 202 but, unfortunately, as I read Section 201 it applies to places of public accommodation as defined in the act, and I find it difficult to make a publicly-owned swimming pool, as in our Tallahassee case, subject to Title II or any subdivision. Similarly, Section 202 appears to apply to any law, etc., of a state or agency which prevents anyone from using the type of public accommodations referred to in Section 201.

I take it that your facts also involve publicly-owned facilities but appear to involve a situation in which the pool was let to someone who would exclude Negroes. That is a somewhat different situation from the Tallahassee case, where there was merely a public closing of the pools and not reletting. In our proposed brief you will see how we discuss that particular aspect of the case and of course we agree that a federal court has the right to act upon a lease given for the purpose of circumventing the law, and if it is now privately operated, Title II would apply.

Cont'd...

Joel

February 10, 1966

Alvin J. Bronstein, Esq.
LCDC
603 N. Farish Street
Jackson, Mississippi

Dear Al:

Thank you very much for Mark Howe's memoranda concerning the closing of a public facility. I am sending Mark a copy of this letter and a copy of the brief we propose to use in our Tallahassee swimming pool case, for his thoughts. I have only read and I regret to say, somewhat hastily, the two memoranda but I find myself a little unpersuaded by the statutory references to Title II of the 1964 Civil Rights Act. There is no doubt that Section 203 makes it illegal to prevent anyone from exercising a right under Sections 201 and 202 but, unfortunately, as I read Section 201 it applies to places of public accommodation as defined in the act, and I find it difficult to make a publicly-owned swimming pool, as in our Tallahassee case, subject to Title II or any subdivision. Similarly, Section 202 appears to apply to any law, etc., of a state or agency which prevents anyone from using the type of public accommodations referred to in Section 201.

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Cont'd...

It is a different question I am afraid and somewhat harder where a municiplaity merely closes a facility. In our brief, we have tried to show that the federal court has the power even to order a municipality to reopen the pools where they were closed for the purpose of violating the Constitution and Title III of the Civil Rights Act. I am anxious, however, to hear Mark Howe's views on the case. Clearly, if we win the Tallahassee case it simplifies everybody's problem.

With best regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/os
Enc.

cc: Mark de Wolfe Howe

March 16, 1966

Mr. Edward W. Wadsworth
Clerk,
United States Court of Appeals,
Fifth Circuit
Room 408
400 Royal Street
New Orleans, Louisiana 70130

Dear Mr. Wadsworth:

Enclosed please find an original (signed) and 19 copies of Appellants' Brief in the case of STEELE, et al v. TAFT, index #23,125-November 8, 1965.

Attached are certificates of service.

Very truly yours,

Encl
SMN:tp

Stephen M. Nagler
Associate to the
General Counsel

March 25, 1966

Hon. Edward Wadsworth, Clerk
United States Court of Appeals
for the Fifth Circuit
Royale Street
New Orleans, Louisiana

Re: STEELE v. TAFT

Dear Sir:

Enclosed please find Motion to Advance the argument in the above entitled proceedings. Simultaneously with the mailing of this letter and the enclosed Motion to you, we are sending copies of the same to Roy T. Rhodes, Esq., and Rivers Buford Jr., Esq., attorneys for the appellees.

Sincerely yours,

CARL RACHLIN,
General Counsel

CR:gm
encl.

cc: Roy T. Rhodes, Esq.
Rivers Buford Jr., Esq.

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

March 31, 1966

Tal. Swim.

APR 4 1966

Mr. Carl Rachlin
Attorney at Law
38 Park Row
New York, New York

Re: No. 23125 - Rochelle Steele, et al
-vs- George B. Taft, et al.

Dear Sir:

I am authorized by this court to advise that your Motion to Advance Oral Argument Appeal was received and filed this 31st day of March, 1966, and under the rules and practice of this Court will be presented for ruling without oral argument on or about April 15, 1966*, together with any response or opposition that may be filed by opposing counsel by that date.

Very truly yours,
Edward W. Wadsworth
EDWARD W. WADSWORTH,
Clerk

/bwc
cc: Mr. John D. Due, Jr.
Mr. Roy T. Rhodes
Mr. Rivers Buford, Jr.

---

* This is only the date on which it is now expected that the matter will be forwarded for ruling, and does not mean that this office will be able to advise counsel of the Court's action by then. Counsel should allow at least ten days' time thereafter for advice as to the Court's ruling before making inquiry.

BEEKMAN 3-2336-7-8

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DATE: May 3,1966

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Carl Rachlin,Esq.
38 PArk Row,
New York, N.Y. 10038

RE:
U.S.Court of Appeals-5th Circ.

Rochelle Steele, etal.Appellant
v
George B. Taft,et al Appellees
(Brief for Appellants)

TERMS:

Mar	16	To printing 65 copies of Brief for Appellants including covers, index,author's changes before final printing all charges included	$ 180.	60		
		tax 5%	9.	00		
			$189.	60	$ 189.	60
		Thank You				

Nancy please see if there is a [illegible] attorney [illegible] Giavani [illegible] copy [illegible] this

Carl [illegible]

ELSBETH LEVY BOTHE
ATTORNEY AT LAW

41 WEST PRESTON STREET
BALTIMORE, MARYLAND 21201

PLAZA 2-2090
SARATOGA 7-4425
AREA CODE 301

September 2, 1966

Carl Rachlin, Esq.
150 Nassau Street
New York, New York 10038

Dear Carl:

In our telephone conversation yesterday, I told you that I would forward a photostatic copy of the deed on which the Levy Park Pool in Tallahassee, Florida is located. Unfortunately, my photostat will not reproduce, but I am herewith giving you the relevant language from the deed;

"That the party of the first part, [Elsa Krause Levy, a widow, Jeanette L. Stemmler...Gertrude L. Giavani... and Sara Levy, a widow,] have granted, bargained and sold unto the said party of the second part [the City of Tallahassee] the following described...tract of land...for use by the party of the second part and its successors for a municipal and public park and/or playground only.

"If the party of the second part or its municipal successors should at any time abandon or cease to use the above described tract of land for municipal and public park and/or public playground purposes, the title thereto shall immediately revert to and VEST in the said parties of the first part, their heirs and assigns."

The conveyance was made in July, 1942. The property conveyed without consideration consists of approximately ten acres, and has been used as a park with a baseball diamond, playground and the usual sort of things. Within the last ten years, a school has been located adjoining and I understand the park area has been used extensively for the school's athletic activities. I believe the family made a nominal contribution toward the improvements, but they have been mainly financed by the Tallahassee taxpayers.

I understand that in 1952 the votors approved a twenty year bond issue for $200,000.00 in order to raise funds for the erection and maintenance of three swimming pools in the three city parks, one of them being Levy Park. The pools were opened sometime in the early fifties. Levy Park Pool was designated for the use of ~~one park~~ WHITE PERSONS. I am told that, next to Little League Baseball, the pools were the major civic recreational activities. Swimmers paid a small admission charge, but this did not fully support the cost of capitalizing and maintaining the pool.

This is the third summer in which the pools have been closed. As you know from the other litigation, the city takes the position that it has closed the pools for economic reasons -- that the cost of their continued operation did not compare favorably with other recreational activities offerred by the city. They claim that desegregation had nothing to do with it! While down there I talked to the City Auditor (a Mr. Cook) who handed me a thick booklet outlining the activities of the Recreation Department which included everything from dog obedience to knitting classes, some of which are conducted in Levy Park. The bond issue for the pools remains payable.

The Levy Park Pool occupies no more than one-fortieth of the total tract, and is located inside of the tract. The pool and surrounding bathhouses now stand as a stumbling block in the middle of the park and are not being used for any purpose. I am told that the city is planning to erect a recreation building on another part of THE tract, and the tract is generally being used in accordance with the provisions of the deed.

The question is, of course, whether this use of the area occupied by the pool activated the reverter clause as to all or any part of the tract. As to the identity of the "owners" in the event of a reversion, the property when donated was owned as follows;

Elsa Krause Levy (my mother, now deceased) 1/6. My brother William and I are her heirs.

Jeanette L. Stemmler 1/6. She is still living.

Gertrude L. Giavani 1/6. She is still living.

Sara Levy, 1/2. Mrs. Levy died one year ago leaving as heirs to her residuary estate, Mrs. Stemmler 1/3, Mrs. Giavani 1/3, and My brother and self 1/6 each.

I believe all of the reversionary owners would be sympathetic and cooperative with actions designed to reopen the pool, providing it is not too extreme. I, of course, would dedicate my interest without any conditions.

I trust you will let me know what your researcher revealed. In a casual check, I tried to find some law on the subject, and notice there is a large body of law on reversion of properties dedicated to school use. Your researcher might take a look at C.J.S. Schools and School Districts paragraph 254.

With kind personal regards, I am

Yours sincerely,

Beth

Elsbeth Levy Bothe

ELB:dsw

September 28, 1966

Edward W. Wadsworth, Clerk
U.S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

Re: No. 23125 Rochelle Steele, et al,
v. George B. Taft, et al

Dear Sir:

As sttorney for appellants I request that I be given the opportunity to present oral argument. Thank you very much for your time and attention.

Very truly yours,

CR:tp

Carl Rachlin
General Counsel

September 29, 1966

John R. Due, Esq.
540½ W. Brevard Street
Tallahassee, Florida

Re: Rochelle Steele, et al,
v. George B. Taft et al.

Dear John:

We have just received word that we are to argue case of Steele v. Taft on November 10th, 1966.

Therefore, I will arrive in New Orleans on the 9th of November.

Sincerely,

Carl Rachlin
General Counsel

CR:tp
cc: Alvin Bronstein

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

October 31, 1966

TO COUNSEL OF RECORD LISTED BELOW:

Re: No. 22677 - National Ins. Underwriters-Nat'l Associated Underwriting Co.
-vs- United States of America

United States of America
-vs- Thomas A. Barker, Jr., etc., et al.

No. 23125 - Rochelle Steele, et al
-vs- George B. Taft, et al.

Gentlemen:

This is to advise that the referenced causes will be called for hearing on Thursday, November 10, 1966 at 9:00 A.M. instead of 9:30 A.M.. Counsel should advise the Clerk's office by 8:30 A.M. of the names of counsel to present oral argument.

Very truly yours,

EDWARD W. WADSWORTH,
CLERK

By Gilbert F. Ganucheau
Gilbert F. Ganucheau
Chief Deputy Clerk

GFG/lgc

Mr. Edward W. Killorin
Attorney at Law
Atlanta, Georgia

Mr. Julius M. Hulsey
Assistant U. S. Attorney
Atlanta, Georgia

Messrs. Robert J. Vollen and
Alan R. Rosenthal
Attorneys, Department of Justice
Washington, D. C.

Mr. Candler Crim, Jr.
Attorney at Law
Atlanta, Georgia

Mr. John D. Due, Jr.
Attorney at Law
Tallahassee, Florida

Mr. Carl Rachlin
Attorney at Law
New York, New York

Mr. Roy T. Rhodes
Attorney at Law
Tallahassee, Florida

Mr. Rivers Buford, Jr.
Attorney at Law
Tallahassee, Florida

Steele v Taft

November 7, 1966

Edwin Charnin, Esq.
160-16 Jamaica Avenue
Jamaica, New York

Dear Ed:

I enclose a copy of a letter from one of our attorneys in Baltimore - a very fine young woman who has been of much help on many occasions on civil liberties and civil rights cases. Just by way of reference and of no significance whatsoever, her husband is the regional director of the UAW.

Now to the merits of the problem. Thursday of this week I will argue in the Fifth Circuit in New Orleans an interesting and rather important case concerning the power of the Federal Court to order a municipality to reppen a public facility closed for discriminatory reasons. To the best of my knowledge this case is a first - with the possible exception of the Prince George's County, Virginia school case, but schools are in such a unique position that it's almost dangerous to use the case as an analogy. In my argument I shall therefore play down the Virginia case.

Elsbeth Levy Bothe, who, as I daid above, lives now in Baltimore, is the descendant of a famous Florida family, in fact I think her grandfather or great grandfather was a Senator during the Confederacy. In any event, her father or her grandfather left property for a park to the city of Tallahassee. One of the three swimming pools closed in our case is in that park. The question on which I would like your advice concerns the possibility of action to reclaim the Levy Park property, since the city is acting in an unconstitutional manner and perhaps inconsistent with the intent and purpose of the gift. The letter I am enclosing goes into some of the details. I would very much appreciate your thoughts on this subject.

With warm regards,

Carl Rachlin
General Counsel

CR:ns
Enclosure

United States Court of Appeals
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130

October 25, 1967

TO: ALL COUNSEL LISTED BELOW

Re: No. 23125 - Rochelle Steele, et al
v. George B. Taft, et al

Gentlemen:

Enclosed is a copy of an order this day entered by the Court directing that this case be reheard by the Court en banc with oral argument on a date hereafter to be fixed. It would now appear that this case will be calendared for oral argument some time during the early part of January, 1968.

You will note that the order also directs the Clerk to specify a briefing schedule for the filing of supplemental briefs. If the parties desire to file supplemental briefs, appellant's brief should be filed by not later than November 20th, with appellee's brief to be filed by December 11th.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By
G. F. Ganucheau
Chief Deputy Clerk

GFG:adg
Encl.

Mr. Carl Rachlin
Mr. Roy T. Rhodes
Mr. John D. Due, Jr.
Mr. Rivers Buford, Jr.

MAY IT PLEASE
THE COURT!

1. We appeal from the ~~dismissal~~ granting of a motion dismissing the complaint

2 The ~~comple~~ motion alleged that complaint did not state a cause of action

3. No other proceedings or pleadings have been had or received

4 The pltfs are Negroes residing in Tallahassee & sue individually and as representatives of a class

5 Defendants are various public officials of the City of Tall having direct or indirect control over Parks and Swimming pools

6 The ~~two~~ bases of jurisdiction is set forth in the complaint ~~and~~ ~~alle~~

7. The complaint alleges

a pltfs are Negroes & US & Fla citizens

2b They and their class have been deprived of equal rt to use facilities in Tallahassee

(c) That on July 4, 1964 - 2 days after the ~~passage~~ signing of the Civil Rts Act by the President Negroes attempted to use a City owned swimming pool in a public park - namely Ofey park - previously reserved exclusively for whites

(d) That afternoon the ~~3~~
3 City-owned parks were closed -
2 white
1 Negro

(e) That ~~they~~ have been closed ever since ~~& that~~ 1

(f) That the City legs has refused to reopen on any basis that would not deny equal utilization

(g) That these acts were done deliberately to prevent desegregation of the pools in violation of the US Constitution

8 — ~~That~~ The relief sought is for an order directing defts to reopen the pools without discrimination

9 — Incidental money damages ~~have~~ are sought

10 — The argument ~~is set forth in~~ ~~That~~ on the motion to dismiss is set forth in the record p 24-60

R 29-33

11 — The position of the City is that (a) they are not operating any pools and therefore we are not entitled

to relief. No where in their argument, set forth in full do they deny any material fact

(b) That a municipality cannot be ordered to provide a discretionary recreational facility

(c) That no funds are provided in its budget for this purpose and any order would involve a direction of appropriation

12- The order dismissing the complaint is in the R 15-17 together with the reasons of the Ct

(a) This is a discretionary service

(b) while the act of closing is "tragically absurd" the Ct can do nothing about it.

(c) The ct relied upon

Hampton v Jacksonville
City of Montgomery v Gilmore
Tonkins v Greensboro
Clark v Flory

13 We urge a reversal for ~~the~~ ~~(a) reasons~~ because
(a) the cases relied upon by the ct do not reach the question herein and thus are not in point

(b) ~~That this ct he~~ That the district did not correctly state the law. While normally a ct will not direct a discretionary act there are certain exceptions such as abuses of discretion which are subject to ~~the~~ power of a ct of equity —

ARGUMENT

A wrong was committed

1 – The Ct below misunderstood its power and duty

2 – In early chancery days injunctions were phrased negatively – to prevent someone from doing a certain act
Lumley v Gye

3. – Gradually in order to obtain further necessary relief double negatives were being used in order to create a positive effect.

4. Thereafter the double negative was dropped and affirmative orders began issuing

5. Here before us we have a city defying the U.S. Constitution by as Judge Carswell put it.

a "tragically absurd policy", are designed to continue Negroes in a second class status.

~~As act is indulged in~~

6 – This act, if allowed to continue, points the way to a permanent thwarting of the collective use of the Constitution and the Courts

7 – That this is no isolated case can be seen that in this very Ct ~~are cases backed up~~ and in the district Cts of this Circuit there are almost cases awaiting ~~the decision of this~~ by stipulation, the decision of this Ct.

8 – Cts of equity have broad powers designed to meet the needs of wrongs committed.

9 We are not here concerned here with disputes over or errors of judgement

10 - Under the guise of carrying out a discretionary act the City defies the U.S. Constitution - it abuses its discretion. There is no discretion to defy the U.S. Constitution

11 - Should they be permitted then no public facility is safe, not even schools

Even schools can be made discretionary

at p 231 Justice Black makes that clear in the Prince Edward case when he says

"Whatever non racial grounds might support a state's allowing a county to abandon public schools,"

In other words - if schools

may be discretionary then what is not?

12 — But just as Justice Black set up the difficulty and danger, ~~to~~ ~~also~~ at the same time [illegible] restricted that danger.

The closing " must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional

13 — Naturally we do not equate schools with pools —

14, But we cannot forget that Virginia had made public schools discretionary

15 — The test ~~there~~ of Justice Black is applicable — is the

closing a unconstitutional act -
Clearly that test is not met here.

16 - It is possible that a court will someday say that no discretion lies with regard to the schools - that they cannot be closed

17 But even if this were to happen the test remains - what is the purpose of the closing? Is it within the discretion or is it, as we have here an unconstitutional abuse of discretion

18 - Once the unconstitutional (or illegal) purpose, as it exists here, is found, the Court then need not throw up its hands - there are remedies to a Ct of

Equity

19 – They must be fashioned to fit the need.

20 In our important matters like schools they can be ordered to reopen and to put a tax into effect to pay for the schools

21 – Or ~~they~~ in a simpler situation they can be ordered to rehire a probationary employee, when fired, ~~without a~~ by the U.S. In these cases the US could have fired him for no reason since he was probationary, but once they fire for ~~a particular~~ security reasons then it becomes a denial of due process not to give him a security hearing

22- Or where an employer commits an illegal act he may be ordered to reopen a large textile plant even though ~~the cost will~~ clearly the discretion to close was his, but once the closing was for an illegal purpose then he loses his discretion, even though the cost may be astronomical

And so the Supreme Court wrote this equitable power into a statute where no such power was expressed, because it was necessary to prevent defiance

22a - Evans v. Gilmore - normally a Trustee may resign his trust, but not when it will mean — etc

23 - Respondents argue that they have not budgeted for this item. ~~By this action~~ But their budget comes up soon and they can be directed to appropriate a sum for this purpose

24 They are asking this Ct to

excuse improper conduct because they do not choose to act legally

They wish ~~to~~ this Ct to permit them to defy the Court because they will not appropriate a sum ~~to~~ necessary to obey the Constitution. — What happened to the money they saved when they closed in the middle of this fiscal year

25 — We merely ask that the parties be put into the position ~~they~~ were in on July 4

26 — It is possible that some day Tallahassee may make a decision to close ~~that~~ the pools that has nothing to do with race. At such time, given the test we set above we will not quarrel in ~~this~~ Ct.

27 — We believe the Ct below relied too heavily on 4 cases ~~without~~ that

are really not in point

28 - In our brief we have discussed these, but I would like to comment a little further on Judge Rives' opinion in City of Montgomery v Gilmore

Stated p 368 of 277 Fed 2d

29 - McLaughlin
white & black. equally.

Additional Instructions

1. Prepare ~~certificates~~ 2 certificates on Roy Rhodes.

2. 65 copies of brief.

and 2 certificates on

Rivers Buford, Jr.
404 Midyette Moor Building
Tallahassee, Florida

404 MIDYETTE MOOR Building

Carl Rachlin

CIVIL PROCEDURE - MOTION to DISMISS

Moore

FRCP.

Genl Rules of Pleading.

Rule 8 (a) Claims for Relief.
(b) Defenses; form of Denials -

Rule 12 (b) defenses presented by motions
(6) failure to state a claim upon which relief can be granted;

If on (6) - ... matters outside the pleadings are presented to and not excluded by the ct, the motion shall be treated as one for summary j & disposed of as provided in Rule 56, and all parties shall be given reasonable oppty to present all matl made pertinent to such a motion by 56.

56 - no genuine issue as to *any* matl fact & that moving party entitled to judgment as matter of law.

Moore's Federal Practice

Moore's Manual. Complete Discussion 2 Moore §12.08.

§11.06, p. 685. Motion to Dismiss for Failure to State Claim

[1] General. Rule 12 (b).

Motion to dismiss tests legal sufficiency of the complaint. For the purpose of the motion, the well-pleaded material allegations of the complaint are taken as admitted; fn2 Clark v Uebersee Finanz Korporation, A.G. (1947) 332 US 480, 68 SCt 174, 92 L ed 148. But conclusions of law or unwarranted deductions of fact are not admitted.

Rule 8 (f). Liberal construction of pleadings.

De Loach v. Crowley's Inc. (CCA 5th, 1942) 128 F2d 378, 6 F R Serv 12b.321, Case 2.

"A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim."

Moore.

... But a complaint should not be dismissed for insufficiency unless it appears to a certainty that Π is entitled to no relief under any state of facts which could be proved in support of the claim. F Rule ~~8f~~ Leimer v State Mut Life Assur Co. (CCA 8th, 1940) 108 F 2d 302;

Pleadings are to be liberally construed. 8f. Mere vagueness or lack of detail is not a ground for a motion to dismiss.

Id. 2 F R Serv 12b.34, Case 1; Ivras v Waterman S.S Corp (ED NY 1948) 75 F Supp 482, 11 F R Serv 12b.222, Case 1.

Conclusions of law or unwarranted deductions of fact are not admitted. Louisiana Farmers' Protective Union Inc. v Great Atlantic & Pacific Tea Co. of America (ED Ark 1941), 40 F Supp 897, 5 F R Serv 8a.24, Case 2.

Procedure

Annotat 42 §183

Rule that complaint is not subject to dismissal on ground of failure to state claim on which relief can be granted unless it appears beyond doubt that π can prove no set of facts in support of his claim which would entitle him to relief is applicable to civil rights actions. Yorke v Story CA Cal 1963, 324 F 2d 450, cert denied 84 S Ct 794, 376 US 939, 11 L. Ed. 2d 659.

In passing on motion to dismiss, court would be required to consider allegations of complaint, as distinguished from conclusions, as admitted facts. Beauregard v Wingard, D C. Cal. 1964 230 F. Supp 167.

See Roberts v Trapnell D C. Pa. 1962, 213 F. Supp 49. (Cons contra)

Memorandum of Argument.

Questions Presented.

I. Whether the act of closing the three municipally owned operated or managed swimming pools (Myers Park, Levy Park, Robinson Trueblood) of Tallahassee, Florida by defendants, officials of the city, for the sole purpose of denying π's (and the class they represent) their ~~privilege~~ ~~equal~~ right to equal utilization of the~~se~~ pools as public facilities was in itself an unconstitutional, discriminatory act prohibited by the equal protection (and D/P) clause of the 14th amendment and in violation of the law of the land?

Statement

Tallahassee

Questions Presented.

9 Oct 1983 [illegible]

1. Whether the Defendants, acting as officials of
the City of Tallahassee, Florida by
closing three ~~facilities~~ municipally owned, operated & many swimming pools
① duty for the sole purpose of discriminatory and unconstitutionally denying the
② right plaintiffs and the class they represent
equal utilization of public facilities
violated the fourteenth amendment
of the Constitution and the law of
the land by thus depriving ~~[illegible]~~ π's of their
privileges or immunities as citizens and of
~~the~~ due process and equal protection of the laws?

2. Whether the officials of the city of Tallahassee who have unconstitutionally discriminated ~~against the Π's~~ by closing municipal swimming facilities for the sole purpose of denying Π's equal utilization of said facilities can be ordered by this court to reopen these facilities which according to the 14th amendment & the law of the land must be operated or managed by the city on a non discrim basis?

Tallahassee Swimming Pool Case. (Steele v. Taft.)

Complaint. Class Action wrt.

III. Denial of equal utilization of public facilities owned, operated or managed by or on behalf of state or subdivision.

IV. ③. Swimming pools.

Myers Park } white.
Levy Park }

Robinson Trueblood } Negro.

XIV 28 US 1342

XV 6 42 US 1983. 6 14th - denial of equal prot.

XVI. July 4 - 1964 - Closed after Negroes attempted to use Levy Park.

XVII ~~D~~ Sole Purpose

Query: damages.

Relief

✓ ①. Act of closing unconstitl

②. Reopen - non discrim basis

③. Enjoin sale etc.

Beyond CR area -

Ct right to order someone to do
Something he doesn't want to do

(affirmative injunctions)

① restraint from closing

Circuit Ct - 50's - Federal Gov't employee -

A144953. Worker Defense League.
N.Y. Watts

Labor

Civil Rights

~~Gov't Employees - [illegible]~~.

Ct - tell a man can't keep it closed.

③ Injunctions (Writs)

Writs
Am Juris
Corpus Juris
Equity Text book

Questions.

Can a court order a community to take this kind of action?

Is a pool like a school?

Closing in order not to have to desegregate is a dishonest position.

Rights if city doesn't sell property - can order - if admitted closed for discriminatory purposes.

See Darling Fox

Research Plans.

①. Civil Rights Act 1964. ✓
②. Procedure wrt motion to dismiss ✓
③. ✓Shepardize - Prince Edward (1964). 377 US 218 84 SCt 1226
Simkins v. Greensboro ✓ 149 F Supp 562 (1957
④. Record - Hampton v Jacksonville ✓

F-19

They made motion on complaint.

① Check Fed'l Rule - motion to dismiss - all averments & reasonable inferences to be taken as true

∴ Argue: assume closed pools solely for purpose of discrim refused integrate after CRA 1964.

every other statement

= state action

(Don't face Selling problem.)

Right to close for discrim purpose.

Brief 1. The Δ's have moved to dismiss - for purposes of this motion the alleg must be taken as fact

2. Set forth important allegations of complaint as facts - (all averments & reasonable intendment are facts).

Facts as set forth in complaint are as follows: closed day asked to segregate - CR Act - July 2, 1964. (take Jud notice)

Write Letter to John Doe

Brief

Hypo 19

LAW (clear)

✓ ① If city operates -- public - must be nondiscrim

② If city owns - else operates (leases) - also applies

Simkins, Burton. ① applies

Issue ③. If city wants to sell - (vis à vis sale)

can action be brought to restrain city from selling or permitting sale to covenant run w/ land maintain on nondiscrim basis - comp to apply 14th -

~~Florida~~ decided

a) Florida law - limitations on sale of public property - can you read into covenant

See Lombard v La - argues where city has property -
Burton - limited in use
Can it in selling
more than it has.

Does limitation on use attach → analyze covenant running w/ land.

④. Rights of city doesn't sell property -
Can order - if admitted there for discrimination

Darlington - implied power in Sup Ct to sanction.
Ad Agency proper means binding
company to reopen a plant
that has been closed

Ct in essence ordering someone to open up.

Is 14th amendment = to a statute?

CRA 64/III July - Effective
" " Delivery

Read

①. Florida Const & Statutes & Tallahassee
ordinances on the sale of property.

②. Kinds of situations in which ct order
public author to do something.

① Pontai

②. Local Gov't cs.

See

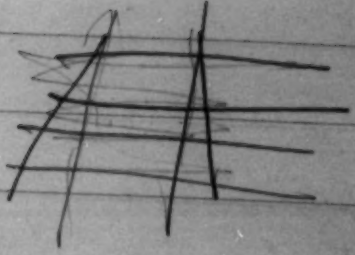
– see quote → [illegible]

Prince Edward:

Given same circumstances – order opening of property closed.

Problem in schools.

②



Assuming equate pool & school;

Shepardize Prince Edward.
Record (Ct.) of case – see arguments.

Greensboro swimming pool case –

James E. Ferguson
1329 College Ave
Bronx 56, N.Y.
LU 8-1955

If the question of good faith (which necessarily involves motive) is to be raised, I would suggest that the factual allegations so indicate E.g. such allegations as:

1) That, on information and belief, defendants alleged reasons for closing said swimming pools is that said swimming pools were causing financial loss to city

2) That, on information and belief, Defendants' sole and actual motive for closing said swimming pools was to avoid an order of this court to desegregate said swimming pools

3) That, on information and belief, defendants made no effort to dispose of said swimming pools in any manner so as to make financial ~~ga~~ gain from them, such as an auction, sale, lease, etc.

The above allegations might also support a prayer in the alternative that defendants be enjoined from closing the pools without a prior good faith effort to auction, sell or lease them. Then, of course, any subsequent owner or operator would be subject to the Civil Rights Act of 1964.

James E. Ferguson, II

Mr Joyce

011
22
33

WRA

Municipal [illegible] Administration

[illegible] Selections 1930

Published for the Institute for Training
in Municipal Administration by
The International City Managers Association
1313 East 60th Street
Chicago [illegible] Illinois

Recreation Data

Jacobhasser

P.S. The [illegible] of Cities

The playground movement in America
resulted from the development of large [illegible]
crowded, congested neighborhoods in which
[illegible] no place to play in safety. [illegible]
country was largely rural in character
[illegible] of recreation was at hand [illegible]
[illegible] people had little [illegible]
[illegible] and [illegible]
[illegible]

~~P3&4~~

Municipal Recreation Administration

Fourth Edition, 1960.

Published for the Institute for Training
in Municipal Admin by
The International City Managers' Association
1313 East 60 Street
Chicago 37. Illinois

(1960).

p. 5. "The Growth of Cities":

"The playground movement in America resulted from the development of large cities with crowded, congested neighborhoods in which children had no place to play in safety. When the country was largely rural in character simple forms of recreation were at hand and available to all. Rural people had little opportunity for social contacts and fellowship, for cultural activities, or even for reading, but large open areas enabled children to play near their homes, while the fields, forests, and waters offered adults opportunities for hunting, fishing, and other sports. People knew their neighbors, and in their work gained satisfactions which today must be sought in leisure. The need for special provisions for recreation was less urgent than it is today when nearly two-thirds of the population live in urban areas.

With the growth of cities, streets became crowded and unsafe for play, vacant lots were built upon, and the habitual recreational space were used for other purposes. Streams and lakes were polluted, forests were cut down, and large areas were closed to public use. With the complexity of city life, neighborliness all but disappeared and living became more artificial and stratified. Man, essentially an outdoor animal, need recreation spaces, facilities and leadership to compensate for the 'natural' resources which crowded city life now denies him.

p6. He also needs, more than before, companionship with his neighbors & with others of similar interests. Under conditions of urban & suburban living opportunities for such companionship are found largely through organized recreation.

p. 7. Increase in leisure

"Wisely used, leisure offers promise of becoming a great boon to the individual and to society. On the other hand it may become a liability, if not a menace, if it is dissipated or used for unsocial ends. The tremendous use of public recreation facilities shows people want such facilities ... The new leisure presents a direct challenge to each community (italics mine) to provide for the recreation needs of the present and to plan intelligently to meet the increasing demands of the future. In accepting or ignoring this challenge each community will decide whether the leisure of its citizens is to become an asset or a liability.

P 8

"Man is not a machine and "his nature is not adapted to long hours of repetitive tasks". ... Psychologists have repeatedly claimed that for people whose energies are used mechanically & uncreatively, recreation becomes a matter of absolute necessity. Recreation is the more important because of the tendency of man to carry over into other phases of life the regimentation and standardization which characterize so much of business & industrial life".

p10 Recreation and Crime Prevention

Since participation in wholesome recreation helps to build character, recreation is obviously a potent agent in the prevention of crime & delinquency. Because recreation activities have a strong appeal for youth, delinquency & crime are less likely to flourish in communities where recreation opportunities are abundant and attractive than in cities or neighborhoods where adequate facilities are lacking. While children & young people are taking part in playground activities, they cannot at the same time be robbing a bank, breaking into a home, or perpetrating some other crime. Because the playground leader p15 helps them develop wholesome interests & furnishes opportunities for pursuing them, the chances of their becoming criminals are materially reduced. ,,

p11 Idle time is not an asset to any community, and most delinquent & criminal acts

are committed during leisure time. Many
crimes are committed because of a desire to do
daring things or to buy pleasure which are much
less satisfying than other forms of recreation
which might be provided by the community at
little cost. Probation officers, police officials
prison authorities in large #'s have testified
from their experience that much delinquency
and crime result from inadequate recreation
opportunities. On the other hand, their testimony
& juvenile court records offer conclusive evidence
of the beneficial effects of wholesome
recreation on children & young people.

p. 11. Recreation & Community Solidarity.

Difference in economic status, social position, race,
creed, nationality, education or cultural background
tend to separate people into distinct and often
hostile groups. Recreation, on the other hand, affords
a common ground where differences may be forgotten
in the joy of participation or achievement. Recreation
is essentially democratic; interest and skill in sports,
drama, or art are shared by all groups & classes.

p 11 (cont).

The young man who excels in swimming or basketball is recognized by followers of these sports, no matter what his creed or color ...

(NB) Playground workers frequently tell of feuds which ~~to~~ either have entirely disappeared or have been converted into enthusiastic competition through participation in organized games & sports. Demonstration of the crafts, games, and music of other countries, presented by national groups have done much to win respect for the foreign born. (NB, NB !!!)

Recreation and Safety, p 12

Safety officials consider that adequate provision for recreation, especially playground under leadership and supervised swimming & winter sport centers, contribute definitely to the reduction of accidents. A single instance may be cited to illustrate the relationship between playground and safety. In a midwestern city of 65,000 it was necessary, because of limited funds, to close the playgrounds 2 weeks before school opened in the fall. During this period the bureau of accident prevention of the police department was asked to keep a separate record of the accidents occurring to children of playground age. Between September 1 and 12, 14 such accidents took place. All occurred while children were running or playing in the street. After hearing the report the local safety council went on record as favoring the continuance & further promotion of playgrounds, convinced that the increase in accidents was due entirely to the early closing of the playground.

The playgrounds themselves are remarkably safe when operated under competent leadership. A report of playground & playfield accidents during a period of one year in a group of cities showed

that the ratio of accidents to attendance
was only 1.19 to each 100,000 visits.
Comparable figures have been reported by
other cities.

(NB)* Many municipal officials
know from bitter experience the serious
hazards presented by unsupervised swimming.
The loss of life is small, however, in the
hundreds of public pools, lakes, and
competent management.
beaches operated under
Repeatedly cities have served more than
a million bathers during a season without a
single drowning. . .

p. 12-13. Recreation and Economy

One of the strongest argument for municipal appropriation for recreation is that the investment pays dividends in dollars and cents as well as in intangible returns. It costs a city several hundred dollars a year to care for one delinquent whereas a playground which may help to prevent many children from becoming delinquent can be operated at an annual cost of only a few $'s per child served. The saving of a single life justifies many times over the cost of operating a playground or swimming pool. If as medical authorities state, physical & mental health depend on participation in wholesome recreation activity the city is wise which spends $ for recreation rather than for mending broken minds & bodies resulting from inadequate opportunities for the recreational use of leisure time. Reducing the recreation budget is likely to be false economy.

... Real estate men and chambers of commerce recognize that one of the best means of attracting "live" people to a community is through advertising its parks, playgrounds, bathing beaches, recreation centers, schools & libraries":

p14. "Today ... recreation is considered a major concern of government — federal, state, and local — and through a variety of agencies govt is contributing to the recreational use of leisure":

!!! NB Recreation a municipal function

Form H-1

HARASSMEN
MENACIN
ASSAU
WEAPO
Resisting Arrest

Criminal Court of the City of New York

Part 1A, County of New York

STATE OF NEW YORK, COUNTY OF New York } ss.:

~~xWilliam Goggins~~ Ptl. Frank Krisa #2886

of No. ~~[illegible]~~.Transit Police, County of New York,

City of New York, being duly sworn, deposes and says that on May 26, 1968, at about 1:40 AM.,

at 42 St. & 8 Ave. subway near booth 62A in the County of New York, State of New York,

the defendant George Stevenson committed the offense of:

......HARASSMENT (Sec. 240.25 Penal Law), in that said defendant, with intent to harass, annoy and alarm another person, attempted to and did strike, shove, kick and otherwise subject him to physical contact;

......MENACING (Sec. 120.15 Penal Law), in that said defendant did, by physical menace, intentionally place and attempt to place another person in fear of imminent serious physical injury;

x......ASSAULT IN THE THIRD DEGREE (Sec. 120.00 Penal Law), in that said defendant, with intent to cause physical injury to another, did cause such injury to a person;

......POSSESSION OF A WEAPON (Sec. 265.05 Penal Law), in that said defendant had in his possession without lawful authority a certain firearm, gravity knife, switchblade knife, billy, blackjack, bludgeon, metal knuckles, sandbag, sandclub and slungshot;

......POSSESSION OF A WEAPON (Sec. 265.05 Penal Law), in that said defendant had in his possession with intent to use unlawfully against another a certain dagger, dangerous knife, dirk, razor, stiletto, imitation pistol and dangerous and deadly instrument and weapon

..x..... Resisting Arrest 205.30 PL

under the following circumstances:

Deponent is informed by George Goggins ~~[illegible]~~ that the defendant did punch him with his clenched fist in the face, ~~kxx~~ knocking him down and causing him to bleed. Deponent further states that after assisting in the arrest of defendant, defendant resisted said arrest by pushing, ~~xxx~~ shoving and swinging his arms wildly at the deponent.

George Goggins - 635 W. 170th St.
Apt 3F

Sworn to before me

May 26, 1968

Judge, Criminal Court of the City of New York

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK :

- against - :

GEORGE STEVENSON :

Defendant :

AFFIDAVIT

DOCKET NO. 11129

STATE OF NEW YORK) SS.:
COUNTY OF NEW YORK)

CARL RACHLIN, ESQ., being duly sworn, deposes, and says:

1. I am the attorney for the above entitled defendant and I have filed a Notice of Appearance.

2. I make this affidavit in support of the request that this case be adjourned until December 4, 1968, or the first available date thereafter.

3. I am unable to appear in Criminal Court of New York County on October 3, 1968, at 9:30 a.m. because I am actually engaged in Columbus, Ohio at a major conference involving federal litigation.

4. I am the Legal Director of the Scholarship, Education and Defense Fund for Racial Equality. We are involved in civil rights and poverty law cases throughout the nation. On August 27, 1968 and August 28, 1968, approximately thirty (30) people were arrested in City Hall Plaza. I have assumed the responsibility of securing private volunteer counsel to represent these people and have spent considerable time in the initial investigation and organization of the cases. I am also involved in cases at various stages of completion in

federal and state courts -- Georgia, etc. v. Cohen, et al. (U.S. Court of Appeals, Fifth Circuit, 1968 -- motion to intervene); Kingwood, et al. v. Campbell Soup Company (U.S. District Court for District of South Carolina, Columbia Division); The People, etc. v. Morris, et al. (Supreme Court of New York, Appellate Term -- First Department); The People, etc. v. Gist, et al. (Supreme Court of New York, Appellate Term -- Second Department); Central Budget Corp. v. Chaneyfield, et al. (Civil Court of New York County); Wilson v. Mohr et al. (New York State Division of Human Rights); and approximately thirty (30) administrative hearings pending in various stages of completion before the New York State Department of Social Services.

WHEREFORE, I respectfully request that the within case be adjourned until December 4, 1968, or the first available date thereafter.

CARL RACHLIN, ESQ.

Office and P. O. Address:
164 Madison Avenue
New York, N. Y. 10016

Telephone: (212) 532-8216

Sworn to before me this

1st day of October, 1968

Richard M. Klein
RICHARD M. KLEIN
Notary Public, State of New York
No. 31-7296425
Qualified in New York County
Commission Expires March 30, 1970

July 9, 1968

Edward Perry, Esq.
District Attorney of New York County
155 Leonard Street
New York, N. Y.

Re: Stevenson, George
Final Hearing, July 23, 1968

Dear Mr. Perry:

My assistant, Richard Klein, has telephoned your office several times. We are anxious to discuss the above case with you. Please let us hear from you.

Very truly yours,

Carl Rachlin
Legal Director

le

SCHOLARSHIP,
EDUCATION AND
DEFENSE
FUND FOR
RACIAL EQUALITY inc.
164 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 532-8216

November 19, 1968

Mr. George Stevenson
1706 Nelson Avenue
Bronx, New York

Dear Mr. Stevenson:

Please call our office as soon as possible. You are scheduled to appear in Manhattan Criminal Court, 100 Centre Street, on December 4. Please be in part 1-B-1 at 9:00 a.m.

Sincerely,

Richard Klein
for
Carl Rachlin
Legal Director

RK:am

Contributions are deductible for income tax purposes

Andrew E. Norman ■ *vice presidents:* William S. Ellis, Nannette Sachs ■ *secretary:* Ezra Levin ■ *treasurer:* Shelley Appleton ■ *executive director:*
■ *leadership development director:* Ronnie M. Moore ■ *legal director:* Carl Rachlin ■ *BOARD OF DIRECTORS:* Nils R. Douglas, *chairman* ■
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laine Slater ■ Rowland Watts

SCHOLARSHIP,
EDUCATION AND
DEFENSE
FUND FOR
RACIAL EQUALITY inc.
164 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 532-8216

April 28, 1969

Mr. George Stevenson
1720 University Avenue
Apt. 3-D
Bronx, New York

Dear Mr. Stevenson:

In accordance with our telephone conversation today I have enclosed your medical statement, factual statement, and complaint.

Very truly yours,

Richard Klein

Richard Klein
for
Carl Rachlin
Legal Director

Contributions are deductible for income tax purposes

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490

George Stevenson
EMPLOYER: GENERAL MOTORS. TARRYTOWN.
-LABELER.
- $128/WK.
May 18 · last week paid.

349-68-7988

DOCKET #B 11129
PART 1B1 · Room 219 2ND FLOOR
No Specific Asst D.A. assigned to
PREVIOUS APPEARANCE JUNE 21, 1968
PREVIOUS D.A. EDWARD PERRY 732-7300 TEL

CLIENT ARRAIGNED 29 MAY, Released $25 BAIL

-Cops didn't tell Stevenson under arrest, rather merely told to put hands behind back. - Hospital · 2 Am.

- 16th Precinct · 38th Street.

CLERK 1B1 566-2967

DOCKET # B11139
349-68-7988

34 (7-67) 250 Bks. NO. 1

A Nº 71496

THE PEOPLE, Etc.

vs.

GEORGE STEVENSON

Def.

Offense 120.00 P.L.

Surety Def.

Residence 1706 NELSON AVE
BRONX, N.Y.

NEW YORK, 5-26- 1968

THIS IS TO CERTIFY that the above named defendant was held on 5-26- 1968 by HON. KIDDER presiding at Pt. 1A N.Y. Court, in the sum of TWENTY FIVE DOLLARS. RECEIPT IS ACKNOWLEDGED from the above named surety of cash OR securities deposited in lieu of bail herein as follows:

CASH TWENTY FIVE DOLLARS $ 25.00

Cert. No.	Description of Securities	Coupons Attached From	Coupons Attached To	Amount
			Total Securities $	

A NENNA
Warden—Clerk

IMPORTANT—*Notice*:—if securities are deposited this receipt must be surrendered to the Director of Finance of the City of New York at the time the depositor becomes entitled to the return of the securities. The surrender of the receipt by the HOLDER thereof shall constitute a full and valid delivery of the described securities and release the Director of Finance from any and all liability thereof. Securities must be called for at this office. Checks for cash will be mailed.

DIRECTOR OF FINANCE OF THE CITY OF NEW YORK
Room 201, Municipal Building, NEW YORK CITY.

Receipt to Surety.

Report 5-28-68
Pt 1B N.Y.
100 Centre St. N.Y.C. 9AM

BEEKMAN-DOWNTOWN HOSPITAL
170 WILLIAM STREET, NEW YORK, N. Y. 10038

NAME GEORGE STEVENSON

ADDRESS 1706 Nelson Ave.
Bx. NY
EXXET

SERVICE RENDERED TO

CASE NO. 202441

DATE TREAT. 5/26/68

AHS NO. & HOLDER

MEDICARE NO.

MEDICAID NO. WC NO.

DATE OF BIRTH

DESCRIPTION	DATE SERVICE RENDERED	CHARGES	CREDITS	BALANCE
BALANCE FROM PREVIOUS STATEMENT				
ER FEE		10.00		10.00
RAY SKULL LT LEG MAY31 68	MAY26 68	40.00		
UTURES MAY31 68	MAY26 68	4.00		
CE BANDAGE MAY31 68	MAY26 68	1.25		55.25

BILLS PAYABLE WITHIN 10 DAYS

PLEASE ENCLOSE STATEMENT
OR CASE NUMBER WITH YOUR
REMITTANCE.

1641 5M 10-67

ESE RATES DO NOT APPLY
THIS IS A LIABILITY OR
MPENSATION CASE.

BEEKMAN-DOWNTOWN HOSPITAL
170 WILLIAM STREET
NEW YORK, N. Y. 10038

F. KRISA
TP
2886

LT. RALPH JENSEN
JUNE 3 '74
Advised -

George Stevenson
EMPLOYER: GENERAL MOTORS. TARRYTOWN
-LABELER
-$128/WK
May 18 - last week paid

349-68-7988
DOCKET #B 11129
PART 1B1 · Room 219 2ND FLOOR
No Specific Asst D.A. Assigned to
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PREVIOUS D.A. EDWARD PERRY 732-7300 TEL

CLIENT ARRAIGNED 29 MAY, Released $25 BAIL

-Cops didn't tell Stevenson under arrest, rather merely told to put hands behind back. - Hospital - 2 AM

-16th Precinct - 38th Street.

CLERK 1B1 566-2967

Between 1:00 and 1:30 A.M., Sunday morning I was on my way home from visiting friends in New Jersey. I got off of the interstate bus at Port Authority Bus Terminal between 41st and 40th Streets on 8th Ave. in New York City. I went to the subway token booth so as I approached the booth, I heard the train coming. I asked the fellow who sells tokens if he would mind giving me my token in a hurry so that I could make the train. He was talking with someone else in the booth and acted as if he was unconcerned one way or the other, as though he resented the fact that I was in a hurry. He intentially prolonged the token purchase. I asked him why he'd do a thing like that and he became more offended. One word led to another. During the conversation another fellow came up to get a token undoubtedly, hearing the conversation. He appeared to resent the fact that I spoke up in my behalf concerning the misunderstanding. He pushed me, quite deliberately as if to say, "Who are you?" In that brief moment I swung my body around to face him and unintentially hit him in the nose with my elbow. His nose began to bleed. I decided to go down to train level. I had no way to defend myself and I felt sure that the three men would side together.

I waited for the subway and two policemen approached me in a very angry manner and requested that I put my hands behind my back so that they could handcuff me. I told them that I was not trying to resist arrest and asked them if it would be all right for them to handcuff my hands in front rather than in back. By this time the other people who were waiting for the train began to gather around to see what was happening. Then the police rushed me upstairs where three more cops were waiting. They, then handcuffed me and began to shove and push me as if I was resisting arrest which I did not even try to do. They forced the handcuffs so tight on my rists that the handcuffs dug into my flesh. They then shoved me down on the floor and all five of the policemen began beating me. They had my face to the floor so that I could not see what all they were doing to me. As a result of this beating, I had to have five stitches closing my head wound. I also have my left leg fractured where they beat on the shank with their night sticks. My right ankle is fractured and swolen so that I can hardly walk. Both of mywrists are fractured and parts of my hands are still numb. My arms and back are also swollen and bruized from the blows I received after they had handcuffed me and pushed me to the floor. They also made a public display of me laying in a puddle of blood which I do believe came from the hole in my head which was caused by repeated blows to my head by the butt of a gun.

I was a public display for at least thirty minutes before they threw me in their car. Although I was bloody and badly beaten, they hit me with their fists with my hands still cuffed behind my back. One policeman said to another one, "Why didn't you shoot him? You should have killed him."

____
Signature of Complaintant

Sworn before me this ____
day of ______, 1968.

____
Signature of Notary Public

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 30402

Otis Chestnut, Susan Karp, Stephen Martinot, Ellen Shallit, Michael Brown, Jeremiah Gelles, Levi Laub, and Robert Apter,

Petitioners-Appellants,

–v–

The People of the State of New York,

Respondent-Appellee.

PETITIONERS-APPELLANTS' BRIEF

Statement of Facts

This is an appeal from an order of Judge Croake, in the District Court for the Southern District of New York, granting the motion of the District Attorney of New York County to remand these proceedings to the Criminal Court of the City of New York without a hearing on the allegations of the petition for removal. The proceedings herein were initially removed to the District Court of the Southern District of New York from the Criminal Court of the City of New York pursuant to Section 1443(1) of the Judicial Code which provides:

> "§1443. Civil Rights cases.
>
> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

> "(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;"

Prosecutions against these young defendants were initiated in the Criminal Court of the City of New York by separate informations charging each of them with the misdemeanor of violation of Section 600, subdivision 6, of the Penal Law of State of New York (criminal contempt of court) for refusal to answer certain questions before the Second August, 1964, Grand Jury of New York County. The informations were filed by the District Attorney at the direction of the same Grand Jury and with the approval of a Justice of the State Supreme Court pursuant to Section 42 of the New York City Criminal Court Act.

The Second August 1964 Grand Jury was purportedly investigating the Harlem riots of the Summer of 1964. The informations allege as to each defendant that he or she improperly refused to answer certain of the Grand Jury's questions purporting to relate to its investigation on the grounds of their Fifth Amendment privilege and the irrelevance of the question.

The defendants' joint petition for removal to the federal court rests upon the unconstitutional selection of the Grand Juries in New York County including the Second August, 1964 Grand Jury. Paragraph 3 of the petition reads:

> "3. The Second August, 1964 Grand Jury was, and is, an illegal tribunal and without authority and null and void in that its members were deliberately chosen, selected and appointed in such a manner, and by such procedures, as to result in the exclusion of the great

> majority of qualified Negro and Puerto Rican citizens and members of low income groups in New York County from the Grand Jury rolls, and to result in the selection of a disproportionate number of upper class non-Negroes and non-Puerto Ricans for Grand Jury service, all in violation of the Equal Protection clause of the Fourteenth Amendment and of Title 18 U.S.C. Section 243."

The New York County Grand Jury is a part of the judicial system of New York State. It is an arm of the Supreme Court and selection of the New York County Grand Jury is governed by the New York Judiciary Law. By its provisions a Grand Jury list from which individual Grand Juries are impanelled is selected annually from residents of New York County. (Judiciary Law, Section 609, App. A, p. 31). Statutory qualifications for individual jurors include ownership of property worth two hundred and fifty dollars, and that the individual be "intelligent, of sound mind and good character; well informed . . ." (Judiciary Law, Section 596, App. A, p. 30)

Final selection of members of the Grand Jury list is made by the County Jury Board. (Judiciary Law, Section 609, App. A, p. 32). The New York County Jury Board consists of the Presiding Justice of the Appellate Division, First Department (or his designees from among the Justices of that Court), two Supreme Court Justices residing in New York County and the County Clerk of New York County and the County Clerk of New York County (Judiciary Law, Section 591, App. A, p. 29). The County Clerk, or his subordinates, interviews potential Grand Jurors and passes preliminarily upon their qualifications (Judiciary Law, Section 595, App. A, p. 29). He then submits the names of persons he considers to be qualified to the County Jury Board which makes the final designation.

The petition for removal (App. 9a-14a) alleges the pendency of the proceedings before trial in the State court and attaches copies of the several informations. The petition alleges that the application of the Judiciary Law in the selection of the Grand Jury list is unconstitutional in that the investigation of potential Grand Jurors by the County Clerk or his subordinates is an engine of discrimination, consisting mainly in determining the financial and economic status of the prospective juror and the exclusion from the Grand Jury list of persons other than high income or considerable assets (paragraph 6). This results in the practical exclusion of Negroes and Puerto Ricans from the Grand Jury list since the great majority of Negroes and Puerto Ricans in New York County are not in the wealthy group (paragraph 7), and mere token representation of these groups on the Grand Jury list (paragraph 9). Paragraph 3 (set forth above) alleges the constitutional nullity of the Second August 1964 Grand Jury under the Equal Protection clause since its members were selected by such procedures as to result in the exclusion of the great majority of Negro and Puerto Rican citizens and members of low income groups in New York County, and the selection of a disproportionate number of upper class non-Negroes and non-Puerto Ricans for Grand Jury service. The Second August, 1964 Grand Jury did not contain a single Negro or Puerto Rican (paragraph 10); that Grand Jury was composed of persons in the upper or upper-middle income bracket, the average annual income of the Grand Jurors being $20,000 (paragraph 11). The pattern of exclusion is further perpetuated by the practice of continuing previously selected Grand Jurors in service from year to year and only selecting replacements for Grand Jurors who have retired (paragraph 8).

The continuing practice of racial and economic exclusion from Grand Juries selected under the provisions of the New York Judiciary Law is shown by Professor Joseph McGoldrick's sampling of the Queens County Grand Jurors as reported in "The Grand Jury in New York," 11 *Columbia Journal of Law and Social Problems*, No. 3, page S-four (February 14, 1966). That sampling of the Grand Jury list showed that 100% of the jurors in the sample were white while Queens County had a population of 8.5% non-whites. Professor McGoldrick's survey showed that the New York State Jury selection process resulted in sharply defined racial, economic and class discrimination. Based on a sample of 120 questionnaires (total questionnaires distributed was 300) returned from persons who had served on grand juries in even-numbered months between December 1960 and April 1963, the following observations were made:

> "1. 94.3 per cent of jurors in the sample were male as compared with 47 per cent in the total population of the county;
>
> "2. median age of jurors in the sample was 57.7 years as opposed to 35.7 (all years) and 50 (ages 35-69) in the county;
>
> "3. 100 per cent of the jurors in the sample were white while the county has 8.5 per cent non-whites;
>
> "4. 76.5 per cent of jurors in the sample were engaged in managerial or professional work as opposed to 25.8 per cent in the county;
>
> "5. 67.8 per cent of jurors in the sample earned more than $10,000 per year compared to 52.4 per cent of the population in the county earning between $3000-$6999;
>
> "6. Jurors sampled averaged 13.9 years of formal schooling in opposition to a county-wide average of 10.9."

Similarly a 1964 random sampling of 250 grand jurors in Nassau County resulted in the following comparisons:

> "1. 1 per cent of jurors surveyed were employed

> as service workers, household workers or laborers compared to 26.6 per cent in this category county wide;
>
> "2. 88.5 per cent of the jury list was composed of professional, technical, managerial and proprietary persons as opposed to only 31.4 per cent of the county in this category;
>
> "3. 10.5 per cent were employed as clerical, sales and kindred workers compared with 41.8 per cent in the county in this category;
>
> "4. 13.2 per cent of grand jurors surveyed were retired and 6.4 per cent were house-wives." *The Grand Jury in New York, supra*

The question of discrimination in the selection of New York Grand Juries has been raised twice in the New York Court of Appeals and each time the Court of Appeals has upheld existing procedures despite an obvious pattern of extreme racial disproportion. In *People v. Agron*, 10 N.Y. 2d 130, 176 N.E. 2d 556, *cert. den.* 368 U.S. 922 the Court of Appeals upheld the constitutionality of the Grand Jury selection system in New York County despite a record showing that only 3 persons out of 2,000 on the New York County Grand Jury list were of Puerto Rican birth, although 17% of the New York County's population were of Puerto Rican birth. In *People v. Dessaure*, 299 N.Y. 126, 85 N.E. 2d 900, *cert. den.* 337 U.S. 949, the Grand Jury selection procedure of Nassau County was upheld although there had been no Negro Grand Jurors for ten years.

The petition for removal asked for a hearing in order that petitioners might establish factually that the allegations of the petition were true, that under the system established by Judiciary Law, Grand Jurors—including the Second August, 1964, Grand Jury—were selected in a discriminatory fashion. The District Attorney moved for remand, not denying the factual allegations of the petition, but asserting that removal was wrong as a matter of law and asking remand without a hearing.

The Ruling in the District Court and on Motion for Stay Pending Appeal

Judge Croake granted the District Attorney's motion for remand without a factual hearing. (His opinion is not yet reported, and is reprinted at App. p. 3a ff.). Judge Croake held himself bound by what he found to be the doctrine of the line of Supreme Court cases ending with *Kentucky* v. *Powers,* 201 U.S. 1, that systematic exclusion of minorities from state Grand Juries must result from state legislative or constitutional provisions before removal under Section 1443(1) would be proper. This Court denied the petitioners' motion for stay pending appeal; *Chestnut* v. *New York* (2 Cir. 1966), F. 2d . Mr. Justice Harlan granted the motion for stay (*Chestnut* v. *New York* 15 L. Ed 2d 842 86 S. Ct. 940), holding that appellants were entitled to have their appeals to the Court of Appeals determined in the light of the Supreme Court's then forthcoming decisions in *City of Greenwood* v. *Peacock,* 384 U.S. 808 and *Georgia* v. *Rachel,* 384 U.S. 780.

ARGUMENT

POINT I

The petition alleges proper grounds for removal under the language of Section 1443(1) of the judicial code. The requested hearing should have been granted.

Under the facts as set forth in the petition, petitioners have a plain right to removal by the language of Section 1443(1). Petitioners have not yet been tried and removal is timely. Under the factual allegations of the petition they have suffered a deprivation of right under the Equal Protection Clause, Title 42 U.S.C Sec. 1981 and Title 18 U.S.C. Section 243, all of which are laws providing for equal rights, cf. *New York* v. *Galamison* (2 Cir. 1965), 342 F. 2d 255, 265, and forbid discrimination in the selection of a state Grand Jury. The Grand Jury which initiated the prosecution was part of the Court for which it was drawn, and the decision of the Supreme Court of the State of New York approving the informations under Section 42 of the Criminal Court act was a "judicial decision" of that Court, not a ministerial one. *(Dodge* v. *Supreme Court,* 249 App. Div. 103, 106, 291 N.Y. Supp. 527, *aff'd* 276 N.Y. 444, 12 N.E. 2d 538).

Under the laws of New York petitioners could only be charged with contempt for refusal to answer a Grand Jury's questions after they had been directed to answer by the Grand Jury. New York Penal Law Section 2447 (App. A, p. 33). The prosecutions were begun under Section 42 of the New York City Criminal Court Act which requires a Grand Jury vote to initiate the process of prosecution. Petitioners were entitled to have each of these Grand Jury decisions made by a constitutionally selected body. The Grand Jury here was not selected constitutionally; Negroes, Puerto Ricans and poor people were systematically excluded. Appellants were thereby deprived of their rights under the Equal Protection Clause, Title 42 U.S.C. Section 1981 and Title 18 U.S.C. Section 243. The initiation of the proceeding by the Grand Jury, and its approval by a Justice of the state Supreme Court were judicial acts depriving petitioners of their equal civil rights under these laws.

In *Wood* v. *Georgia,* 370 U.S. 375, 390, the Supreme Court pointed out the "invaluable function" of a state Grand Jury:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group or other, to determine whether a charge is founded upon reason and was dictated by an intimidating power or malice or ill will."

Where the Grand Jury selection process operates discriminatorily, the Grand Jury's actions are invalid. *Neal* v. *Delaware,* 103 U.S. 370 (1880).

The Constitution imposes no method of Grand Jury selection upon the states. It does require that whatever method of selection be used its end result not be discriminatory. Thus, in *Hill* v. *Texas,* 316 U.S. 400, 404, the Court said of the local jury commissioners:

> "They thus failed to perform their constitutional duty —recognized by § 4 of the Civil Rights Act of March 1, 1875, 8 U.S.C. § 44, and fully established since the decision in 1881 of *Neal* v. *Delaware, supra*—not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds."

Chief Justice Vinson speaking for the Court in *Avery* v. *Georgia,* 345 U.S. 559, 561, said:

> "The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.' Hill v. Texas, 316 U.S. 400, 404 (1942). If they failed in that duty, then this conviction must be reversed—no matter how strong the evidence of petitioner's guilt. That is the law established by decisions of this Court spanning more than seventy years of interpretation of the meaning of equal protection.'"

In *Akins* v. *Texas,* 325 U.S. 399, 403, the Supreme Court said:

> "But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.'"

It is clear that what is important under the Supreme Court decisions is the *result* of the selection process and not the subjective self image of the selectors. The selection system must not "*operate* to discriminate (*Hill* v. *Texas, supra*); it must not be a system which "*results* in discrimination" (*Akins* v. *Texas, supra*). (emphasis supplied).

In *Rabinowitz* v. *U.S.A.* (5 Cir., No. 21,256, decided July 20, 1966, not yet officially reported), the Court found that the selection process for the Grand Jury and petit jury in the Middle District of Georgia, had operated discriminatorily. The Court found no "affirmative evil intent" of the jury commissioners (slip opinion, p. 3). Nevertheless, the Court held (slip opinion, pp. 50-51):

> "In defense of the jury commissioners, it is said

that they did not specifically intend to exclude Negroes from federal juries. The jury commissioners must be held to have intended the natural result which flowed from their conduct. Compare *Glasser* v. *United States*, 1942, 315 U.S. 60, 86; *Smith* v. *Texas*, 1940, 311 U.S. 128, 132; *Radio Officers* v. *NLRB*, 1954, 347 U.S. 17, 45. In these cases the qualifications required and the method of selecting prospective jurors have over a large period of time, list after list, resulted in Negroes being substantially underrepresented. The fruits of the harvest were clear to anyone who cared to look:

> " 'If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose. The purpose may not be of evil intent or in conscious disregard of what is conceived to be a binding duty. Prohibited conduct may result from misconception of what duty requires. Such misconception I believe to be the real situation on the record before us.'
>
> "The Constitution and laws of the United States place an affirmative duty on the Court Clerk and the jury commissioner to develop and use a system that will probably result in a fair cross section of the community being placed on the jury rolls."

The petition's allegations show a case clearly within the strictures of the Supreme Court decisions. Mere "token" representation of minority groups on the Grand Jury is not constitutionally or legally sufficient. *Brown* v. *Allen*, 344 U.S. 443, 471. Paragraph 9 of the petition specifically alleges only token representation of Negroes or Puerto Ricans on the Grand Jury list; the whole thrust of the petition is that there is an illegal, unconstitutional systematic exclusion of minority groups from the Grand Jury list of New York County, and from the Second August 1964 Grand Jury. It was therefore a fundamental error for the District Court to remand the proceeding to the state court without granting a prior factual hearing on the allegations of the petition.

POINT II

Georgia v. *Rachel, supra,* and *City of Greenwood* v. *Peacock, supra* support appellant's position here.

For many years no feasible method was available for appellate review of District Court orders remanding cases after removal pursuant to Section 1443 and its predecessors. As a consequence, there had been no development of a truly authoritative interpretation of the statute for the sixty-year period since *Kentucky* v. *Powers,* 201 U.S. 1 (1906). In 1964, however, Congress amended the statute to provide for appellate review of orders granting remand (28 U.S.C. Section 1477(d)). At approximately the same time, civil rights groups commenced to remove state criminal cases to federal courts. On the last day of its 1965 term the Supreme Court handed down its decisions in *Georgia* v. *Rachel, supra* and *City of Greenwood* v. *Peacock, supra,* thereby giving the first authoritative gloss to Section 1443(1) since *Powers.* In *Rachel* removal was upheld; in *Peacock* it was disallowed.

Neither *Rachel* nor *Peacock* involved the situation here, a pre-trial deprivation of equal rights occurring in the judiciary branch of the state government. Rather both concerned the substantive factual circumstances of the arrest and charge; the violations of right alleged for removal were "not a part of the state judicial system." *Peacock* v. *City of Greenwood,* (5 Cir., 1965), 347 F. 2d 679, 684. (In *Peacock* removal was sought on a claim that the arrests there were made for reasons of racial discrimination and to prevent First Amendment demonstrations for equality of civil rights. In *Rachel,* the arrests were purportedly for demanding service on an equal basis in a restaurant later covered by the anti-discrimination provisions of the 1964 Civil Rights Act.) Nonetheless, in those decisions the Supreme Court has elucidated fundamental principles governing the meaning and application of Section 1443(1) which support appellants' position here. Those principles are (1) a distinction between present and threatened denials of equal right in the state court, and (2) a broadening of the basis for removal where the denial of right alleged for removal is a threatened denial rather than an existing denial.

A. *Rachel* and *Peacock* Do Not Limit the Right to Removal Here. This Petition Concerns an Existing Deprivation of Right in the State Judicial System. The Limitations Imposed on Removal by *Rachel* and *Peacock* Apply to Threatened, Future Deprivations of Right.

Unlike previous petitions for removal considered by the Supreme Court and this Court which were rejected as insufficient, petitioners here seek removal on the ground of an existing denial of right in the state court, rather than a potential, threatened future denial. They thereby bring themselves squarely within the language of the statute for removal; moreover, existing judicial circumscriptions of Section 1443(1) are inapplicable.

The statutory requirement that a petitioner for removal be one who "is denied or cannot enforce" his equal civil rights encompasses two different basic situations. This is apparent from the statutory use of the disjunctive "or" rather than the conjunctive "and". The phrase "is denied" is in the present tense and has no connotation of futurity.

It refers to an existing denial of equal rights. On the other hand, the phrase, "cannot enforce" imports futurity from the nature of the subject matter. Whether a right can be enforced is a matter of prediction; whether a right is denied is a question of fact which is capable of factual proof or disproof.

Moreover, to equate "is denied" and "cannot enforce" is to create a tautology in the statute, and make one of the phases surplusage. This Court has already refused to find surplusage in the language of the section, and thereby was able to distinguish "civil rights" from "equal civil rights". *Galamison,* 342 F. 2d at page 268. There is likewise no reason to assume that Congress intended that either phrase, "is deprived" or "cannot enforce", to be useless rhetoric. Both phrases, therefore, have a separate significance and are applicable to different problems.

Historical analysis vindicates the distinction between "is denied" situations and "cannot enforce" situations. The phrase "is denied or cannot enforce" stems from Section 3 of Civil Rights Act of 1866* (Act of April 9, 1866, C. 31, §3, 14 stat. 27) which provided for both pre-judgment and post-judgment removal by persons who "are denied or cannot enforce" their rights in state courts. In that context the distinction between the concepts of rights which have been denied in the past, and rights which may be denied *in futuro* becomes more readily visible. As Chief Judge Haymeworth pointed out in *Baines* v. *City of Danville* (4 Cir., 1966), 357 F. 2d 756, 770 fn. 55:

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* SEC. 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever.

> "Prior to 1875, when post-judgment removal was permissible, removal could be had after a trial if the judgment of the trial court were discriminatory or if there *had been* a denial of one of the protected rights." (emphasis added)

Mr. Justice Stewart's opinion in *Rachel* makes the same point: the phrase "is denied" refers to already existing deprivations of right which are capable of proof; the phrase "cannot enforce" requires a prediction by the federal courts that rights will be denied.

> "When Congress adopted the first civil rights removal provisions in §3 of the Civil Rights Act of 1866, it incorporated by reference the procedures for removal established in §5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756. The latter section, in turn, permitted removal either at the pre-trial stage of the proceedings in the state court or after final judgment in that court. There can be no doubt that post-judgment removal was a practical remedy for civil rights defendants invoking either the "denied or cannot enforce" clause or the "color of authority" clause of the 1866 removal provision in order to vindicate rights that had *actually been denied* at the trial." (emphasis added) (384 U.S. at p. 794)

In a line of cases commencing with *Strauder* v. *West Virginia,* 100 U.S. 303, and *Virginia* v. *Rives,* 100 U.S. 313, halting with *Kentucky* v. *Powers,* 201 U.S. 1, and commencing again with *Rachel* and *Peacock,* a series of defendants in state courts attempted pre-trial removal under the "cannot enforce" section of the statute on the ground that they would be denied their rights *in futuro,* or would be unable to enforce them. Except in *Strauder* and *Rachel* the Supreme Court rejected these contentions, ruling that a mere "apprehension" of denial of rights was not sufficient for removal since a defendant could not swear before his case came to trial that his enjoyment of his equal civil rights would be denied to him. (*Virginia* v. *Rives,* 100 U.S. at 319-320). The Court refused to predict unfairness in the state courts.

None of the Supreme Court cases, including *Rachel* and *Peacock,* concerns an existing judicial deprivation of equal right, the issue involved in this proceeding. Those cases arose under the "cannot enforce" section of the statute and were concerned with the threatened deprivation of rights *in futuro.* This case, however, arises under the "is deprived" section and involves an existing deprivation of right. Thus the remedies of removal available under Section 3 of the Civil Rights Act of 1866 for both pre-trial and post-trial situations are still presently available in this pre-trial situation "to vindicate rights that had actually been denied." (*Rachel,* 384 U.S. at p. 794).

The limitations imposed by the Supreme Court cases upon the operation of "cannot enforce" cases involving threatened deprivation of right are, therefore, inapplicable here. Likewise inapplicable is the rationale underlying those cases. Unlike *Rives,* for instance, the defendants here can affirm under oath that there is a deprivation of right since that is a fact and not a mere "apprehension." And the requirement of *Rachel* is met that the right must appear with relative clarity before trial and that the federal judges not be placed in the "unseemly position of pre-judging their brethren in the state courts." (*Rachel,* 86 S.Ct. at p. 1796). Where as here a present deprivation of right is alleged, the facts can be determined by a hearing; no pre-judgment of the state court before its action is involved, the action has already taken place.

B. The State Statutes Governing Jury Selection Are an Unconstitutional Denial of Equal Protection on Their Face. Appellants Would Be Denied Their Rights If Forced to Proceed in State Court. *Rachel* and *Strauder* Authorize Removal Here.

Even if we view the petition here as one for removal on the basis of a threatened denial of right, a "cannot enforce" case, the petition is still a valid one. The alternative situations in which *Rachel* authorized removal are present here. The New York statutes governing Grand Jury selection deny equal protection on their face. Moreover, to force defendants to trial in the state court on the present information would be a denial of equal right.

In *Strauder* the Supreme Court recognized an exception to its refusal to predict the conduct of state courts. Where the deprivation of right *in futuro* would spring from a state statute, the defendant would be justified in verifying a petition for removal and the Court would be justified in a prediction that the state court would obey its own statutes. Mr. Justice Stewart, speaking for the Court in *Rachel* summarized the *Strauder* doctrine as follows:

> "The *Strauder-Rives* doctrine, as consistently applied in all these cases, required a removal petition to allege, not merely that rights of equality would be denied or could not be enforced, but that the denial would take place in the courts of the State. The doctrine also required that the denial be manifest in a formal expression of state law. This requirement served two ends. It ensured that removal would be available only in cases where the predicted denial appeared with relative clarity prior to trial. It also ensured that the task of prediction would not involve a detailed analysis by a federal judge of the likely disposition of particular federal claims by particular

> state courts. That task not only would have been difficult, but it also would have involved federal judges in the unseemly process of pre-judging their brethren of the state courts. Thus, the Court in *Strauder* and *Rives* concluded that a state enactment, discriminatory on its face, so clearly authorized discrimination that it could be taken as a suitable indication that all courts in that State would disregard the federal right of equality with which the state enactment was precisely in conflict." (384 U.S. at pp. 803-804).

Mr. Justice Stewart's opinion then proceeded to lay down a broader basis of removal for *in futuro* deprivations than had previously been recognized.

> "In *Rives* itself, however, the Court noted that the denial of which the removal provision speaks 'is primarily, *if not exclusively,* a denial . . . resulting from the Constitution or laws of the State. . . ." 100 U.S., at 319. (Emphasis supplied.) This statement was reaffirmed in *Gibson* v. *Mississippi,* 162 U.S. 565, 581. The Court thereby gave some indication that removal might be justified, even in the absence of a discriminatory state enactment, if an equivalent basis could be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court. Such a basis for prediction exists in the present case." (384 U.S. at p. 804)

Removal for a threatened deprivation of right is therefore now permitted, not only where the right will be occasioned by an unconstitutional statute, but wherever the evidence will support an "equivalent basis . . . for an equally firm prediction" that a petitioner for removal would be denied his right in the state court. In *Rachel* the Court found this basis in the fact that (if petitioners' allegations were proven) the Civil Rights Act of 1964 made the fact of any trial in the Georgia court a deprivation of right. Petitioners here meet both the *Strauder* and *Rachel* criteria for removal.

1. The Unconstitutional State Statutes Governing Grand Jury Selection.

The vehicle of the inequality in selection of the Grand Jurors of New York County lies in the misuse of economic criteria for jury selection, and in the unbridled discretion lodged in the County Clerk in selecting those persons who shall serve as grand jurors. Both aspects of discrimination rest on and spring from the unconstitutional vagueness of Section 596 of the Judiciary Law which, on its face, violates the Equal Protection Clause. In *Louisiana* v. *United States*, 380 U.S. 145, the state law placed the right to vote in the unlimited discretion of the local voting register, a discretion identical with the discretion of the County Clerk and County Jury Board here, by the requirement that the prospective voter be able to "understand" the Federal or State Constitution. The Supreme Court held this statute to be a violation of the Equal Protection clause and the Fifteenth Amendment, saying in part (380 U.S. at p. 153):

> "This is not a test but a trap sufficient to stop even the most brilliant man on his way to the voting booth. The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints. See, e.g., *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81. Squarely in point is *Schnell* v. *Davis*, 336 U.S. 933 (D.C.S.D. Ala.), in which we affirmed a district court judgment striking down as a violation of the Fourteenth and Fifteenth Amendments an Ala-

> bama constitutional provision restricting the right to vote in that state to persons who could "understand and explain any article of the Constitution of the United States" to the satisfaction of voting registrars. We likewise affirm here the District Court's holding that the provisions of the Louisiana Constitution which requires voters to satisfy registrars of their ability to "understand and give a reasonable interpretation of any section" of the Federal or Louisiana Constitution violate the Constitution. And we agree with the District Court that it specifically conflicts with the prohibitions against discrimination in voting because of race found both in the Fifteenth Amendment and 42 U.S.C. Sec. 1971 (a) to subject citizens to such an arbitrary power as Louisiana has given its registrars under these laws."

Section 596 of the New York Judiciary Law stands on no better constitutional footing than does the outlawed Louisiana statute. It too places the fate of a potential grand juror at the "passing whim or impulse" of local officialdom. The requirement that a potential grand juror be "intelligent; of sound mind and good character; well informed" provides no standard at all other than that he gain the personal approval of the County Clerk and his subordinates. Like the Louisiana Law it is equally invalid as "devoid of standards and restraints," and a denial of equal protection.

Only recently President Johnson, in a message to Congress, has pointed out the discriminatory evil inherent in jury selection statutes such as New York's *(New York Times,* April 29, 1966, p. 22):

> "The fabric of law enforcement extends from the police patrol to trial and correction. Racial discrimination in any part of this fabric can spoil the rest.

It is necessary that we improve our investigative resources. It is necessary that we strengthen Federal authority against interference with basic rights and impose meaningful sanctions on those who violate them.

Yet if we go only this far—and permit racial discrimination to corrupt the selection of juries—we shall leave at the center of our legal system a potential for injustice that mocks our hopes for a great and just society. Trial by a freely selected jury of one's peers is not a new right. It has its roots in the Magna Carta. Blackstone described it as the "grand bulwark" of man's liberties.

Yet we have been reminded in recent months that in many areas the exclusion of minority groups from jury service remains systematic and complete.

Denying jury service to any group deprives it of one of the oldest and most precious privileges and duties of free men. It is not only the excluded group which suffers. Courts are denied the justice that flows from impartial juries selected from a cross section of the community. The people's confidence in justice is eroded.

Jury discrimination takes many forms, open and subtle, intentional and inadvertent.

Many jury officials may compile their basic list of potential jurors from membership lists, clubs and civic organizations that tend to exclude minority groups.

Some state laws require jury officials to make highly subjective judgments of a juror's "integrity, good character and sound judgment."

Moreover, Section 596 of the Judiciary Law requires that individuals who do not own property of the value of two hundred and fifty dollars be disqualified from jury service. This statute is likewise an unconstitutional denial of equal protection, on its face. In *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, the Supreme Court outlawed the Virginia poll tax of $1.50 per year as violative of the Equal Protection Clause. The Court said:

> "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which individually discriminate." (383 U.S. at p. 666)
>
> * * * *
>
> "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination. (Skinner v. Oklahoma, 316 US 535, 541, 86 L. ed. 1655, 1660, 62 S. Ct. 1110) that runs afoul of the Equal Protection Clause." (383 U.S. at p. 668)
>
> * * * *
>
> "For to repeat, wealth or fee paying has, in our view no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." (383 U.S. at p. 670)

Even more applicable here is Mr. Justice Black's statement in dissent:

> "It should be pointed out at once that the Court's decision is to no extent based on a finding that the

> Virginia law as written or as applied is being used as a device or mechanism to deny Negro citizens of Virginia the right to vote on account of their color. Apparently the Court agrees with the District Court below and with my Brothers Harlan and Stewart that this record would not support any finding that the Virginia poll tax law the Court invalidates has any such effect. If the record could support a finding that the law as written or applied has such an effect, the law would of course be unconstitutional as a violation of the Fourteenth and Fifteenth Amendments and also 42 USC Sec. 197 1 (a)." (383 U.S. at p. 672)

The appellants here make exactly the point Mr. Justice Black found wanting. The financial qualification laid down by the New York statute for Grand Jury duty is part and parcel of a "mechanism to deny" service on the Grand Jury to Negroes, Puerto Ricans and other members of low income groups. *A fortiori,* is as unconstitutional as the use of the Virginia poll tax to restrict voting.

2. Appellants Would Be Denied Their Rights If Forced to Proceed in the State Court.

As we have pointed out, the Supreme Court in *Rachel* recognized for the first time that circumstances other than an unconstitutional state statute might deprive defendants of their equal rights or justify the prediction that their equal rights would not be enforced in state court. In *Rachel* the Court found these circumstances from the fact that (if defendants' allegations were true) the Civil Rights Act made the *fact* of prosecution in the State Court a deprivation of right. The instant case likewise falls within the authority of Section 1443(1) even without taking the unconstitutional statutes into consideration. This is so even if we equate the statutory phrases "is denied" and "cannot enforce" as both imparting prophecy. For it would be a clear denial of right to force defendants to trial upon informations whose validity rests upon the vote of an illegally selected Grand Jury. *Neal* v. *Delaware, supra.* Thus this case would be governed by the Supreme Court's holding in *Rachel* that a case is removable when the very act of proceeding to trial would be a denial of right.

Conclusion

Petitioners-appellants have come to a federal court to vindicate a great federal right, a legally, constitutionally selected state grand jury. It has been said on motion for a stay pending appeal *(Chestnut, et al* v. *People of the State of New York* (2 Cir. 1966), —— F. 2d ——, that appellants have shown "no basis" for the belief that their claims will not receive fair consideration in the state court. It is respectfully submitted that the statute does not place a burden upon the appellants to show that deliberate unfairness will exist in the judiciary of the State of New York. What they must show for federal jurisdiction, appellants have shown: a deprivation of equal rights in the state courts.

Without showing unfairness in the state courts, the reason why appellants should prefer a federal court to a state court for the determination of their rights is plain. These proceedings were instituted with the approval of a Justice of the Supreme Court of New York. The claimed deprivation of right arises in the context of the judicial system of the state, and before and by a state Grand Jury, a part of the state judiciary. The appellants complain that the system of selection of the New York County Grand Jury results in the exclusion of minority groups, a most serious charge in a locality composed of minority groups. The process by which the Grand Jury is selected is part of the very warp and woof of the New York judicial system and those charged with Grand Jury selection are eminent in that judicial system. Appellants, in vindicating a federal right, should not be compelled to proceed before a state judge where their very claim attacks the legality of the acts of his brother judges or of a judge superior in rank. It is to forfend such an inherent handicap that Section 1443(1) gives appellants the right of removal. That right should be upheld in this Court.

The order below should be reversed and a factual hearing ordered on the allegations of the petition.

Respectfully submitted,

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New York, N. Y. 10022

Attorneys for Appellants

those charged with crime, have alleged are vested in that judicial system, appellants, in vindicating a federal right, should not be compelled to proceed before a state judge when their very claim attacks the legality of the acts of his brother judges or of a judge superior in rank. It is to forfend such an inherent handicap that Section 1443(1) gives appellants the right of removal. That right should be upheld in this Court.

The order below should be reversed and a factual hearing ordered on the allegations of the petition.

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Attorneys for Appellants

APPENDIX A

Relevant Constitutional Provisions and Statutes

The Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. Section 1981.

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

Title 18 U.S.C. Section 243.

§ 243. Exclusion of jurors on account or race or color

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

New York City Criminal Court Act,

§ 42. The panel of three judges; informations

(1) Where the defendant has been held to answer for trial in a part of the court held by a panel of three of the judges thereof as provided in section forty of this act, or where such a trial shall be directed in a misdemeanor case by a grand jury and approved by order of the court for which the grand jury is drawn, the action must be prosecuted by information made by the district attorney. . . .

New York Judiciary Law.

§ 590. County clerk to select, draw, summon and empanel jurors

The county clerks of the counties included within a city having a population of one million or more shall select, draw, summon and empanel all jurors for all courts within their respective counties and shall decide upon their qualifications and exemptions, in the manner prescribed by this article, those sections of the code of criminal procedure regarding grand jurors, or the rules adopted pursuant thereto, provided, however, that when preparing ballots for jurors, he shall indicate on the ballot of each juror whether he has conscientious scruples against the death penalty as would prevent him from returning a verdict of guilty of any crime punishable by death. But this section shall not operate to impair the right to challenge a particular juror at a trial. As amended L. 1965, c. 778, § 1, eff. Sept. 1, 1965.

§ 591. County jury board

There shall be established for each county of a city having a population of one million or more a "county jury board" which shall consist of the presiding justice of the appellate division of the supreme court for the department embracing the county, or his designee from among the justices of the court, two justices of the supreme court residing in the county to be designated by the justices of the appellate division for the department embracing the county, and the county clerk of the county. Such designations, except of the county clerk, shall be made in writing, filed in the office of the county clerk, and shall continue in effect until changed.

The county jury board shall exercise the powers and duties in regard to the selection of grand jurors as prescribed by section six hundred nine of this article.

The county clerk shall also consult with the county jury board in regard to the proper and efficient administration of the jury system. As amended L.1951, c. 305, eff. March 29, 1951; L.1955, c. 797, § 4; L.1962, c. 692, § 62, eff. Sept. 1, 1962.

§ 595. Examination as to fitness; personal interviews; police records

No person's name shall be entered on a jury list unless (a) he has been personally interviewed by the county clerk, (b) he has stated his qualifications under oath, or in a certificate or questionnaire pursuant to section twelve hundred thirty-two-a of the penal law, (c) his name has been forwarded to the police department for checking against the records of that department and a report received or a reasonable time has elapsed without such a report, and (d) the county clerk, in the case of grand jurors, shall also have received a certificate of the central bureau of criminal identification, records and statistics from the state commissioner of correction in accordance with the provisions of section six hundred nine of this article. As amended L.1953, c. 493, § 1, eff. April 4, 1953; L.1955, c. 797, § 5, eff. July 1, 1955.

§ 596. Qualifications of jurors

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, is a resident of that county, within the meaning of this section. Added L.1940, c. 202 § 1, eff. Sept. 1, 1940.

Appendix A

§ 609. Grand jurors in the counties within the city of New York

1. Selection of grand jurors. The annual list of persons to serve as grand jurors at the terms of the supreme court for the trial of criminal actions within the city of New York, for each year beginning January first and expiring December thirty-first following, shall be made up in the following manner: the county clerk of each county shall make special investigation of persons qualified to serve as trial jurors. The county clerk shall require each applicant for service as a grand juror to record the fingerprints of his two hands in such manner as to contain legibly the points (including the deltas and cores) necessary to afford accurate and complete classification by the state department of correction. Such fingerprints shall be promptly forwarded to the central bureau of criminal identification, records and statistics of such department at Albany with the request that all information on file as to the previous record, if any, of such person, be forthwith transmitted to the county clerk. Upon receipt of such fingerprints, it shall be the duty of the commissioner of correction to cause them to be classified and to cause his records to be searched for information as to the previous record, if any, of the person to whom such fingerprints pertain. If there is no previous record, he shall report that fact. If there is such previous record, he shall promptly transmit to the county clerk full information thereon. The report of the commissioner of correction certifying to the previous criminal record of any person shall be presumptive evidence of the facts so certified. If the commissioner of correction shall report to the county clerk the previous criminal record of an applicant for grand jury service, the county

clerk shall not place the name of such person upon the grand jury list if such person's record contains a conviction for a felony or for a misdemeanor involving moral turpitude. If such commissioner shall report to the county clerk a previous criminal record of any such person containing a conviction for a felony or a misdemeanor involving moral turpitude, the court clerk shall immediately transmit such inforamtion to the district attorney, together with any questionnaire that may have been signed by such person in accordance with rules promulgated by the appellate division of the supreme court pursuant to the provisions of section five hundred ninety-two of the judiciary law.

The county clerk shall make a list of those persons who, this investigation shows, are suitable to serve as grand jurors. He shall note upon such list the name of each person whose record shows a conviction for a misdemeanor which in his opinion does not involve moral turpitude. The list shall contain the names of at least the maximum number of persons permitted for the annual grand jury list. The annual grand jury lists shall be selected therefrom by the respective county jury boards.

The number of persons to be selected annually to serve as grand jurors in the counties within the city of New York shall be fixed by rules of the appellate divisions of the supreme court.

2. County jury boards. The county jury boards shall meet annually at the office of the respective county clerks during the month of November on the day fixed by the county boards. The presiding justice of the appellate division of the supreme court, or his designee from among the associate justices of the appellate division, shall act as chairman; in case of the absence of such presiding justice, the members

present, if a quorum, shall elect one of their number chairman. Two members exclusive of the county clerk, shall constitute a quorum for the transaction of business, and if a quorum be not present the board shall adjourn from day to day until a quorum is obtained. The county clerks shall act as secretaries of the respective boards. The county boards may further convene from time to time to fill any vacancies in the lists of grand jurors or to add such number of names thereto as are necessary to make up the full complement of jurors.

3. Summoning; non-attendance. Grand jurors shall be summoned in the same manner as trial jurors and shall be subject to the same penalties as provided in article one hundred and sixteen of the penal law.

4. Drawing of Grand jury. Grand jurors shall be drawn by the county clerks of the respective counties under the supervision of the judge or judges of a court of record resident or sitting in such county designated by the appellate division. The method of drawing and the keeping of minutes thereof shall be governed by rules of the appellate division of the supreme court in the departments in which the counties are located.

New York Penal Law

§ 2447. Witnesses' immunity

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person

answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

* * * *

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence;

APPENDIX B

Docket Entries

UNITED STATES DISTRICT COURT

Civil Docket 65 Civ 1574

◆

The People of the State of New York

Respondent

vs.

Otis Chestnut,
Susan Karp,
Stephen Martinot,
Ellen Shallit,
Michael Brown,
Jeremiah Gelles,
Levi Laub,
Robert Apter,

Petitioners

◆

May 24-65	Filed petition & record on removal from Criminal Ct., City of NY, County of NY
May 24–65	Filed defts. notice of removal
Nov. 10-65	Filed respondent's notice of motion to remand—ret. 11-16-65
Nov. 10–65	Filed affdvt. of Robert T. Hartmann
Nov. 10–65	Filed respondent's memorandum of law
Nov. 23–65	Filed petitioners' memorandum in opposition to motion to remand (filed in court)

Docket Entries

Feb. 10–66	Filed memo endorsed on motion filed 11-10-65 —Motion to remand the cause to the Criminal Court of the City of New York is granted—So ordered—Croake, J.
Feb. 11–66	Mailed certified copy of memorandum & order of remand to Clerk of the Criminal Court, City & County of NY
Feb. 15–66	Filed petitioners notice of appeal—mailed copies.
Mar. 7–66	Filed certified copy of order—that the enforcement of order of Croake, J. dated 2-9-66 be stayed pending determination of the appeal in Court of Appeals—Harland, J.
Mar. 25–66	Filed notice of record on appeal.

District Court Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

◆

OTIS CHESTNUT, SUSAN KARP, STEPHEN MARTINOT, ELLEN SHALLIT, MICHAEL BROWN, JEREMIAH GELLES, LEVI LAUB and ROBERT APTER

Petitioners

—v—

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

◆

CROAKE, *District Judge*

MEMORANDUM

This is a motion by the respondent, pursuant to 28 U.S.C. § 1447(c),[1] remanding the action to the Criminal Court of the City of New York, County of New York.

Petitioners have been charged in informations with criminal contempt following their refusals to answer questions before the Second Grand Jury of the County of New York for the August 1964 term. The petition for removal, pursuant to 28 U.S.C. § 1443,[2] filed on May 24, 1965, states the following:

> "3. The Second August, 1964 Grand Jury was, and is, an illegal tribunal and without authority and

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[1] "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case."

[2] 28 U.S.C. §1443(1) provides for the removal of an action "Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.

State law or federal law?

null and void in that its members were deliberately chosen, selected and appointed in such a manner, and by such procedures, as to result in the exclusion of the great majority of qualified Negro and Puerto Rican citizens and members of low income groups in New York County from the Grand Jury rolls, and to result in the selection of a disproportionate number of upper class non-Negroes and non-Puerto Ricans for Grand Jury service, all in violation of the Equal Protection clause of the Fourteenth Amendment and of Title 18 U.S.C. Section 243.[3]

"4. The selection of grand jurors in New York County is governed by Section 609 of the Judiciary Law.

"5. That section provides that the County Clerk shall first make a 'special investigation of persons qualified to serve as trial jurors.' The County Clerk is directed to make a list of those persons who, the aforementioned special investigation shows, 'are suitable to serve as grand juors.' It is from this list that the annual grand jury list is selected. It is from the annual list that grand jurors are selected for each term of the Supreme Court and ultimately for a particular panel.

"6. The manner in which Section 609 of the Judiciary Law relating to the selection of grand jurors is applied is unconstitutional in that the

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[3] 18 U.S.C. §243 provides that: "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

'special investigation' conducted by the County Clerk consists mainly in ascertaining the financial and economic status of the person under investigation which in practice invariably means that persons of other than high income or considerable assets are never, or rarely, selected.

"7. Inasmuch as the great majority of Negroes and Puerto Ricans in New York County are not in the high income group, the method of selection of grand jurors necessarily serves to exclude them from serving as grand jurors.

"8. This pattern of exclusion is necessarily perpetuated inasmuch as most persons who serve on grand juries volunteer for service over and over again. Thus, the grand jury list, the annual list and the venue from which a particular panel is selected will invariably contain the names of those persons who have theretofore passed the 'special investigation' test.

"9. As a result of the foregoing only a token few Negroes and Puerto Ricans have ever had their names included on the grand jury lists for New York County or been selected for grand jury duty.

"10. The particular Grand Jury before which the petitioners were compelled to appear did not contain one Negro or Puerto Rican.

"11. Upon information and belief the average annual income of the members of the said Grand Jury was $20,000. Each and every member thereof was in the upper or upper-middle income bracket.

"12. There are thousands upon thousands of Negro and Puerto Rican citizens of New York County who are qualified to serve as grand jurors

> who by reason of the foregoing are not permitted to do so.
>
> "13. The said Second August, 1964 Grand Jury in questioning the petitioners was purportedly engaged in the investigation of the activity of petitioners and the activities of others associated with them in the Harlem riots of July 1964 and in other protests and demonstrations directed or resulting from racial discrimination.
>
> "14. By reason of the illegal composition of the Second August, 1964 Grand Jury, and by reason of the nature of the investigation, petitioners in being questioned were deprived of equal protection of the laws and their rights under Title 18 U.S.C. Section 243, and no prosecution for contempt can be based on their refusals to answer questions before said Grand Jury."

Petitioners sought the holding of a hearing concerning the alleged "systematic exclusion of Negroes and Puerto Ricans and persons other than high income status from Grand Juries in New York County," and a dismissal of the prosecutions.

In support of the instant motion, it is urged that the petition is defective on its face for failure to state facts, that the doctrine of the Supreme Court cases ending with *Kentucky* v. *Powers,* 201 U.S. 1 (1906), limiting the application of 28 U.S.C. 1443(1) to denial by state laws rather than state practice, bars removal and apparently also, by the citation of *People* v. *Agron,* 10 N.Y. 2d 130, 218 N.Y.S. 2d 625, 633 (1961), *cert. denied,* 368 U. S. 922 (1961), that absent an allegation of intentional discrimination, a cause for removal is not stated.

After a careful examination of the arguments raised and cases cited, the court is of the opinion that it may not appropriately read the principle of the *Powers* line of cases so as not to include the instant petition and that therefore removal may not be had. Admittedly, that doctrine has been questioned, see *People* v. *Galamison,* 342 F. 2d 255, 271-2[4] and the concurring opinion of Judge Kaufman at 273 (2d Cir. 1965), *cert. denied,* 380 U.S. 977 (1965), and limited in its scope by several recent Fifth Circuit decisions. See *Cox* v. *State of Louisiana,* 348 F. 2d 750, 53-5 (June 29, 1965); *Peacock* v. *City of Greenwood,* 347 F. 2d 679, 680-84 (June 22, 1965), *cert. granted,* 34 LW 3237, January 17, 1966; *Rachel* v. *State of Georgia,* 342 F. 2d 336 (March 5, 1965), *cert. granted,* 382 U.S. 808 (October 11, 1965). However, these cases do not appear to so confine the doctrine as to warrant a determination by a district court not to apply it in the instant circumstances. In *Peacock,* it was stated that:

> "In our view, . . . [the prior Supreme Court cases] establish only that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from grand and petit juries must result from state legislative or constitutional provisions." 347 F. 2d at 683.

Notwithstanding the following passages that:

> "The stated rationale for this rule was that the deprivation of protected rights had to be shown in

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[4] The court there noted that the question was then before the Fourth Circuit in *Baines* v. *City of Danville,* No. 9080, and *McGhee* v. *City of Danville,* No. 9082. See *Baines* v. *City of Danville,* 337 F. 2d 579, 602 (1964), where that court, which had heard the cases en banc, granted the petition for rehearing of this issue (per curiam). Research by the court did not disclose a decision in this matter and, on January 27, 1966, by a telephone call to the Deputy Clerk of the Fourth Circuit, it was learned that the court, with two judges dissenting, had rendered an opinion on January 21, 1966, concluding that the causes had been properly remanded. A petition for certiorari was filed on January 28, 1966. See 34 LW 3267.

> advance of trial. However, this reasoning gives way to the fact that the illegality of a grand jury indictment springing from a systematic exclusion would be susceptible of proof prior to trial. The rationale was also advanced in these decisions that questions other than those arising from the terms of the statute should be left to state courts for vindication. This does not follow for state courts are bound under the Federal Constitution to protect a litigant from the loss of rights even in the case of express language in a state statute." Id. at 683-4,

it was stated, at p. 684, that:

> "[Those cases] . . . dealt only with the systematic exclusion question, a question which in turn goes to the very heart of the state judicial process, and federalism may have indicated that the remedy in such situations in the first instance should be left to the state courts. We would not expand the teaching of these cases to include state denials of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process."

Accordingly, the motion to remand the cause to the Criminal Court of the City of New York is granted.

So Ordered.

Dated: New York, N. Y.
February 9, 1966

/s/ Thomas F. Croake
Thomas F. Croake
U. S. D. J.

Petition for Removal

UNITED STATES DISTRICT COURT

Southern District of New York

No. 65 Civ. 1574

◆

The People of the State of New York

—against—

Otis Chestnut,
Defendant.

The People of the State of New York

—against—

Susan Karp,
Defendant.

The People of the State of New York

—against—

Stephen Martinot,
Defendant.

The People of the State of New York

—against—

Ellen Shallit,
Defendant.

Petition for Removal

THE PEOPLE OF THE STATE OF NEW YORK

—against—

MICHAEL BROWN,

Defendant.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JEREMIAH GELLES,

Defendant.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

LEVI LAUB,

Defendant.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

ROBERT APTER,

Defendant.

◆

To the Honorable Judges of the United States District Court for the Southern District of New York

Your Petitioners respectfully petition this Court, pursuant to Title 28 U.S.C.A. Section 1443, for the removal of the above-styled proceedings to this Court from the

Criminal Court of the City of New York, County of New York, and in support of this petition allege as follows:

1. The above entitled criminal proceedings are presently pending and awaiting trial in the Criminal Court of the City of New York, County of New York, in which each petitioner is a defendant.

2. Each of the petitioners herein is charged in the Criminal Court of the City of New York with criminal contempt, a violation of Section 600, subdivision 6 of the Penal Law of the State of New York by reason of their refusal to answer certain questions before the Second August, 1964 Grand Jury of New York County. Copies of the several informations are annexed hereto. Said proceedings were commenced by the District Attorney of New York County at the direction of the said Grand Jury.

3. The Second August, 1964 Grand Jury was, and is, an illegal tribunal and without authority and null and void in that its members were deliberately chosen, selected and appointed in such a manner, and by such procedures, as to result in the exclusion of the great majority of qualified Negro and Puerto Rican citizens and members of low income groups in New York County from the Grand Jury rolls, and to result in the selection of a disproportionate number of upper class non-Negroes and non-Puerto Ricans for Grand Jury service, all in violation of the Equal Protection clause of the Fourteenth Amendment and of Title 18 U.S.C. Section 243.

4. The selection of grand jurors in New York County is governed by Section 609 of the Judiciary Law.

5. That section provides that the County Clerk shall first make a "special investigation of persons qualified to

serve as trial jurors". The County Clerk is directed to make a list of those persons who, the aforementioned special investigation shows, "are suitable to serve as grand jurors". It is from this list that the annual grand jury list is selected. It is from the annual list that grand jurors are selected for each term of the Supreme Court and ultimately for a particular panel.

6. The manner in which Section 609 of the Judiciary Law relating to the selection of grand jurors is applied is unconstitutional in that the "special investigation" conducted by the County Clerk consists mainly in ascertaining the financial and economic status of the person under investigation which in practice invariably means that persons of other than high income or considerable assets are never, or rarely, selected.

7. Inasmuch as the great majority of Negroes and Puerto Ricans in New York County are not in the high income group, the method of selection of grand jurors necessarily serves to exclude them from serving as grand jurors.

8. This pattern of exclusion is necessarily perpetuated inasmuch as most persons who serve on grand juries volunteer for service over and over again. Thus, the grand jury list, the annual list and the venue from which a particular panel is selected will invariably contain the names of those persons who have theretofore passed the "special investigation" test.

9. As a result of the foregoing only a token few Negroes and Puerto Ricans have ever had their names included on the grand jury lists for New York County or been selected for grand jury duty.

10. The particular Grand Jury before which the petitioners were compelled to appear did not contain one Negro or Puerto Rican.

11. Upon information and belief the average annual income of the members of the said Grand Jury was $20,000. Each and every member thereof was in the upper or upper-middle income bracket.

12. There are thousands upon thousands of Negro and Puerto Rican citizens of New York County who are qualified to serve as grand jurors who by reason of the foregoing are not permitted to do so.

13. The said Second August, 1964 Grand Jury in questioning the petitioners was purportedly engaged in the investigation of the activity of petitioners and the activities of others associated with them in the Harlem riots of July 1964 and in other protests and demonstrations directed or resulting from racial discrimination.

14. By reason of the illegal composition of the Second August, 1964 Grand Jury, and by reason of the nature of the investigation, petitioners in being questioned were deprived of equal protection of the laws and their rights under Title 18 U.S.C. Section 243, and no prosecution for contempt can be based on their refusals to answer questions before said Grand Jury.

Wherefore, Petitioners pray:

1. That this petition for removal be filed pursuant to Title 28 U.S.C.A. Section 1443:

2. That a hearing be held in this Court concerning the systematic exclusion of Negroes and Puerto Ricans and

persons other than high income status from Grand Juries in New York County;

3. That this Court dismiss the prosecutions;

4. That this Court grant such other and further relief as may be just and proper.

OTIS CHESTNUT
Otis Chestnut

SUSAN KARP
Susan Karp

STEPHEN MARTINOT
Stephen Martinot

ELLEN SHALLIT
Ellen Shallit

MICHAEL BROWN
Michael Brown

JEREMIAH GELLES
Jeremiah Gelles

LEVI LAUB
Levi Laub

ROBERT APTER
Robert Apter

(Verified May 24, 1965)

Notice of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Civ 1574

OTIS CHESTNUT, SUSAN KARP, STEPHEN MARTINOT, ELLEN SHALLIT, MICHAEL BROWN, JEREMIAH GELLES, LEVI LAUB, and ROBERT APTER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Sir:

PLEASE TAKE NOTICE that upon the annexed affidavit of Robert T. Hartmann, Assistant District Attorney in and for the County of New York, dated November 3, 1965, and on all the papers and proceedings herein, the undersigned will move this Court at a term thereof to be held at the United States Courthouse at Foley Square, in the Borough of Manhattan, City of New York, on the 16th day of November, 1965, at 10 a.m., Room 506, pursuant to Title 28, Section 1447, subdivision C of the United States Code, remanding the above-entitled action to the Criminal

Notice of Motion

Court of the City of New York, County of New York, for such further relief as the Court may deem just and proper.

Dated: New York, N.Y., November 3, 1965.

Yours, etc.

Frank S. Hogan
District Attorney
New York County

To:

Sanford M. Katz
36 West 44th Street
New York 36, New York

Basil R. Pollitt
52 Sidney Place
Brooklyn 1, New York

Attorneys for Defendants

Affidavit of Robert T. Hartmann

[SAME TITLE]

State of New York,
County of New York—ss.:

Robert T. Hartmann, being duly sworn, deposes and says:

1. He is an Assistant District Attorney in and for the County of New York and he is assigned to the prosecution of the above petitioners in a criminal matter now pending in the Criminal Court of the City of New York.

2. On March 9, 1965, seven of the petitioners were arrested and the other, Martinot, was arrested on March 13, 1965, all by members of the New York City Police Department. They were charged with Criminal Contempt, by information after the 2nd August, 1964 Grand Jury had voted that each matter be transferred to the Criminal Court of the City of New York, following refusals by the petitioners to answer questions involving the Harlem Riots of 1964, after each was granted immunity.

3. The petitioners were arraigned and either paroled or released on bail. Their cases were called for trial on May 25, 1965, and the petitioners, through their attorney, informed the Court that on May 24, 1965, the petitioners filed their petition in the District Court. The cases then pending against the petitioners in the Criminal Court of the City of New York have been adjourned until November 30, 1965, to await a determination of their removal petition.

4. The petitioners in their verified petition do not allege facts to support their position but rather submit conclusions, based upon fiction rather than facts, that are couched in flagrant generalities and seem contrived to undermine the integrity of the County Clerk of New York County, the presiding justice of the First Appellate Division of the Supreme Court and his associate justices. The petitioners' allegation in paragraph three (3) of their petition is a statement so general and without an iota of factual basis relevant to this case before the Court that it is totally without merit.

5. Contrary to petitioners' claims in paragraphs five (5) and six (6), the law in question has never been held unconstitutional, is not unconstitutional, and is, in fact, basic to the concept of ordered administration of justice.

6. Petitioners' allegations in pargraphs seven (7), eight (8), and nine (9), are so general and so vague that they are nothing short of conjecture, and have no basis in fact whatsoever.

7. The petitioners allege, in paragraph eleven (11), a so-called "fact" relying not upon any knowledge or fact, but rather upon information and belief. Furthermore, they try to establish this "fact" by using "the average annual income", which has no relevancy or probative value in this matter.

8. The allegation, contained in paragraph twelve (12), is indicative of the vague generalities and factless conclusions which permeate this petition, as illustrated by the phrase "thousand upon thousand".

9. Another attempt is made to mislead this Court in paragraph thirteen (13) of the petition by use of the following phrases:

> "in other protests and demonstration directed or resulting from racial discrimination."

The only matter, that the 2nd August 1964 Grand Jury was conducting an investigation into, was whether violations of the Penal Law relating to conspiracy to commit the crime of riot had occurred in New York County in 1964.

In view of these facts, the respondent respectfully urges this Court to remand these proceedings to the Criminal Court of the City of New York, pursuant to Title 28, Section 1447, Subdivision (c), of the United States Code.

ROBERT T. HARTMANN
Robert T. Hartmann

(Sworn to November 3, 1965.)

Strauss
v
Hanley

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application

of

OTIS CHESTNUT, SUSAN KARP, STEPHEN MARTINOT, ELLEN SHALIET, MICHAEL BROWN, JEREMIAH GELLES, LEVI LAUB and ROBERT APTER,

for an Order Pursuant to Section 593 of the Judiciary Law Granting Leave to Examine and Copy Answers, Data and Information Obtained in Interviewing, Examining and Investigating the members of the 1964 Grand Jury List for NEW YORK COUNTY.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of BASIL R. POLLITT, Esq. verified the 29th day of December, 1966 the undersigned will move the Court at the Courthouse, Madison Avenue and 25th Street, New York, N.Y. on the 12th day of January, 1967 at 10:00 A.M. in the forenoon or as soon thereafter as counsel can be be heard, for an Order pursuant to the provisions of Section 593 of the Judiciary Law, permitting them to examine and copy the answers, data and information obtained in interviewing, examining and investigating the persons appearing on the 1964 grand jury list for New York County and for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served at least five days before the return date of this motion.

Yours etc.
Basil R.Pollitt
Sanford M.Katz
Attorneys for Movants
Office & P.O. Address
52 Sidney Place,
Brooklyn 1,N.Y.
UL 5-6505

TO: District Attorney of N.Y.County
155 Leonard Street,N.Y. N.Y.
County Clerk of New York County
60 Centre St.New York,N.Y.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
- -X

In the Matter of the Application

of

OTIS CHESTNUT, SUSAN KARP, STEPHEN MARTINOT,
ELLEN SHALLET, MICHAEL BROWN, JEREMIAH GELLES,
LEVI LAUB AND ROBERT APTER,

AFFIDAVIT

for an Order Pursuant to Section 593 of the
Judiciary Law Granting Leave to Examine and
Copy Answers, Data and Information Obtained
in Interviewing, Examining and Investigating
the members of the 1964 Grand Jury List for
NEW YORK COUNTY.

- -X

STATE OF NEW YORK)
COUNTY OF KINGS) ss:.

BASIL R. POLLITT being duly sworn deposes and says:

1. I am one of the attorneys for the moving parties herein. I make this affidavit in support of their application for leave pursuant to Section 593 of the Judiciary Law to examine and copy the answers, data, and information, obtained in interviewing and examining the members of the 1964 grand jury list for New York County.

2. Each of the applicants is presently charged in the Criminal Court of the City of New York with the misdemeanor of contempt of court (Section 600. subdivision 6 of the Penal Law) for refusal to answer certain questions before the Second August 1964 Grand Jury of New York County. The informations were filed by the District Attorney at the direction of the same grand jury and with approval of a Justice of the Supreme Court pursuant to Section 42 of the New York City Criminal Court Act.

3. The applicants intend to move before the Supreme Court to revoke and annul its approval of the laying of the informations on the ground (among others) that the 1964 grand jury list, from which the second August 1964 Grand Jury was chosen, ~~and~~ was selected in violation of the equal protection clause of the Fourteenth Amendment in that it was deliberately chosen in such a manner and by such procedures, as to result in the systematic exclusion and mere token representation of the great majority of qualified Negro and Puerto Rican citizens and members of low income groups in New York County ~~from~~ or the grand jury list, and to result in the selection of a disproportionate number of upper class non-Negroes and non-Puerto Ricans for grand jury service.

4. The United States Court of Appeals for the Second Circuit has recently viewed this contention as a "very serious constitutional issue." Chestnut et al v New York, (2 cir., 1966)_____F.2d_____ (not yet reported), Moreover, the applicants' contention is not without some substantiation already.

On information and belief, the Second August 1964, grand jury, chosen by lot from the 1964 grand jury list contained not one Negro or Puerto Rican! Twenty one members of that panel had incomes of $10,000.00 or higher. It will be noted that, according to the 1960 census only 20% of the white inhabitants of New York County attained this income, and only 1.6% of the Negro population! Statistically it is improbable that the composition of the Second August 1964 grand jury varied significantly from the composition of the Grand Jury list. Certainly, there is indication enough that a further investigation is warranted. For it is a legitimate proof of the inadequacy of the selection system that the results were discriminatory.

5. Such an investigation necessarily requires access to the answers, data and information under the control of the County Clerk. The applicants herein have limited means. They cannot afford a private investigation of each of the two thousand or so persons on the grand jury list. Hence, to deny this motion is to deny them their day in Court, for a great deal of the relevant data is contained in the files of the County Clerk. For instance, I am informed and believe that the finger print records of all potential grand jurors show whether the person involved is a Negro. A credit check is run on each grand juror; these reports should certainly furnish data about the economic status of the grand jurors. The grand jurors applications themselves, and the trial jury questionairres in some instances will likewise disclose relevant information concerning the composition of the grand jury list.

6. The attention of the Court is respectfully called to the decision in Matthews v. County Clerk of Kings County, (2d.Dept., 1961), 13 A.D. 2d 712 granting similar relief.

WHEREFORE it is respectfully requested that an order issued granting the applicants leave to examine and copy, either personally or by their agents and attorneys, the answers, data and information obtained in interviewing, examining and investigating the members of the 1964 grand jury list for New York County, and such other and further relief as to the Court may seem just and proper.

Sworn to before me this
29th day of December, 1966

Basil R. Pollitt

MOLLYE [illegible]
NOTARY [illegible] of New York
No. 24 [illegible] in Kings Co.
[illegible] March 30, 196[illegible]

8

For Intervenor

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

---x

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

---x

SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL PURSUANT TO EXECUTIVE LAW § 71

DANIEL M. COHEN
Assistant Attorney General
of Counsel

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Pursuant to Executive Law § 71
The Capitol, Albany, N.Y. 12224

New York Office
80 Centre Street, New York, N.Y. 10013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

---X

NATHAN STRAUS, :

Plaintiff,

-against- :

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York, :

Defendants. :

---X

SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL PURSUANT TO EXECUTIVE LAW § 71

Since the various adjournments of the defendants' motion to dismiss and the making of two motions now before the Court for permission to intervene render it appropriate, this supplemental brief is submitted to aid the Court.

I.

The motions for intervention have been made by two incorporated associations of persons. It should be noted that the same arguments addressed to the standing of the original plaintiff apply to these corporations. The Attorney General, therefore, supports the position of the Corporation Counsel, in opposing the granting of such motions.

II.

The statutory history of Judiciary Law, § 596, is enlightening. Long before there was either a substantial Puerto Rican or Negro population in New York, the Judiciary Law contained property qualifications. Obviously, therefore, there can be no sound argument made here that the property qualification set forth in the Judiciary Law was intended to discriminate against either of these groups by reason of either their race or place of origin.

The purpose of the present provision of Judiciary Law, § 596, was stated in 1940 by the Judicial Council to be (6th Annual Report and Studies of Judicial Council, p. 195) to present "a uniform jury system" and "to provide jurors of high calibre and character".

The derivation of Judiciary Law, § 596, was stated by the Judicial Council as follows (pp. 205-206):

"This section derives from section 598 and 599 of the Judiciary Law, describing the qualifications of jurors in the county of New York, and section 686 of the Judiciary Law, describing the qualifications of jurors in the county of Kings. Certain changes and additions in the present qualifications have been made in the proposed section, as follows:

The property requirement proposed herein, in subdivision 3, is the same as that existing in the counties of New York and the Bronx. The existing property requirement for the counties of Kings (Judiciary Law, sec. 686, subd. 3), Queens and Richmond (Judiciary Law sec. 502, subd. 3), is personal property of the value of $250 or real property of the value of $150. In the interests of uniformity the real property requirement has been made $250 throughout the city, the same as the personal property value.

Subdivision 5 is entirely new as to the qualifications for trial jurors. It is adapted from subdivision 2 of section 749-a of the Code of Criminal Procedure in regard to special jurors. It has been inserted in accordance with the Judicial Council's goal of requiring all jurors to be of uniformly high calibre.

The qualifications set forth in subdivision 6 have existed for more than a century and have served their purpose well. The only change in that the requirement 'free from all legal exceptions' has been omitted since it seems to have no legal meaning. The phrase 'well-informed' has been added, deriving from Judiciary Law sec. 502 governing qualifications for jurors outside of New York and Kings counties.

> There has been a change in the dwelling qualification as set forth in the last paragraph of proposed section 596. The phrase 'or having or maintaining a dwelling or lodging' was added to the existing dwelling qualification in present section 599. This change was made in order to make available for jury service persons who have dwellings or lodging in the county but who are absent much of the time on pleasure or business trips.
>
> This section, together with section 595, if carefully administered, should help to weed out undesirable jurors and to improve the general character of trial juries."

The property restrictions in Judiciary Law, § 596 were derived from Judiciary Law (L. 1909, ch. 35) then Chapter 30 of the Consolidated Laws. In 1909, Judiciary Law (in its then § 598).

> "§ 598. Qualifications of trial jurors. In order to be qualified, to serve, as a trial juror, in a court in the County of New York, a person must be:
>
> 1. A male citizen of the United States, and a resident of that country.
>
> 2. Not less than twenty one nor more than seventy years of age.
>
> 3. The owner, in his own right, of real or personal property, of the value of two hundred and fifty dollars; or the husband of a woman who is the owner, in her own right, of real or personal property of that value.

> 4. In the possession of his natural faculties, and not infirm or decrepit.
>
> 5. Free from all legal exceptions; intelligent; of sound mind and good character; and able to read and write the English language understandingly."

The 1909 provision (contained in its subdivision 3) had, in turn, been derived from a provision contained in L. 1870, ch. 539, "an Act in relation to jurors in the city and county of New York" which provided as follows (§ 5 § 6, subd. 1):

> "§ 5. No person shall serve as a juror unless he shall be an intelligent man, of sound mind, and good character, free from legal exception, and able to read and write the English language understandingly.
>
> § 6. The commissioner of jurors shall exempt from serving as jurors the following persons:
>
> 1. Every person who is not, at the time of application, the owner in his own right or in the right of his wife, of real or personal estate of the value of two hundred and fifty dollars."

It must be evident that neither in 1909 nor in 1870 were either the property qualifications or exemption provisions of the respective statutes directed against either Negroes or persons of Puerto Rican origin.

III.

Particularly since delegates were elected in November, 1966 for the purpose of attending a constitutional convention in April, 1967 and since the issue which is sought to be presented herein has so long been available for presentation, this Court should hesitate even to assume jurisdiction as to any constitutional issue now sought to be presented. It might be appropriate, however, for this Court to call to the attention of the Commission currently studying revision of the New York State Constitution, the possibility or desirability of including in the revised New York Constitution, a provision prohibiting the inclusion of a property qualification for jurors.

Moreover, there has been introduced at the request of the Attorney General, a bill to amend the Judiciary Law, to eliminate the property qualification herein involved. See Sen. Intro. 562 Ass. Intro. 1507: Print No. 1507 introduced by Senators Greenberg and Dominick; and Assemblyman Burrows.

In view of the pendency of this legislation, which has been referred to the Judiciary Committee of each of the houses of the Legislature, it is respectfully suggested that action be deferred.

CONCLUSION

THIS ACTION SHOULD BE DISMISSED AND JUDICIARY LAW, § 596, SHOULD BE UPHELD AS CONSTITUTIONAL.

Dated: New York, New York
January 24, 1967

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pursuant to Executive Law, 571

DANIEL M. COHEN
Assistant Attorney General
of Counsel

[1966][July?]

STATEMENT OF NATHAN STRAUS

WELCOMING CORE AS CO-PLAINTIFF IN LAWSUIT AGAINST NEW YORK STATE

I am delighted to welcome Mr. McKissick and his group into this fight against descrimination in the courts of our state. As many of you know, I instituted this law suit on April 6th to challenge the Constitutionality of provisions of the New York State Judiciary Law which I contend deprive minority groups of adequate representation on Grand Juries.

As the Law now stands, persons who serve on Grand Juries are required to own $250 dollars in real or personal property. This is a kind of poll tax, and I hold that the provisions of the Law which make this requirement mandatory is unconstitutional. I also object to other qualifications of the Law which require that jurors be, and I quote, "intelligent and well informed." I have just returned from Mississippi, one of several states notorious for their abuse of this type of subjective qualification. For too long the Grand Jury system has served as a private preserve, and antiquated customs and prejudices have weighed against the minority group member who seeks equal status before the Law. It is about time that the Grand Jury system catches up with the twentieth century.

I am shocked that the State Government has seen fit to intervene in defense of the undemocratic property requirement, and of the descriminatory practices now being used in selection of Grand Juries.

I started this suit prepared to go as far as necessary to remove one more vestige of discrimination from our lives. Mississippi practices must not be permitted to continue in New York. I am grateful for CORE'S encouraging action in joining with me.

# # # # # # # # # # #

The Social Composition Of The Grand Jury Panels Of The Supreme Court of Kings County, New York, 1958-1962

By

Vernon K. Dibble

April, 1967

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ACKNOWLEDGMENTS

This report would not have been possible without the help, advice, and work of many people. Eugene Gold, Esq., who initiated the study, and Basil Pollitt, Esq. made a number of useful suggestions and, more generally, helped considerably by having a good feel for both the differences and the overlap between the methods and styles of thought of lawyers and of sociologists.

At a number of points I consulted people who gave their time and the fruits of their experience to my questions. These include Dr. Allen Barton, Director of the Bureau of Applied Social Research; Dr. Abram J. Jaffe, Director of the Bureau's Manpower and Population Program; Professor Harrison White of Harvard University; and David Elesh, Neil Henry, Ray Maurice, Fred Meier and Arnold Simmel, all of the Bureau of Applied Social Research. Dr. Lloyd Kirban of the Market Research Corporation of America consulted on the mail questionnaire and on the administration of the survey. He and his assistant, Miss Ann Breen, cheerfully coped with my impossible demands in order to do what the mail survey required, in the required way, within a very brief period of time.

A number of students at Columbia College, including Marc Bernstein, Walter Handschin, Michael Josefowicz, Peter D. Miller, Jeffry Pearson, Michael Tempel, and John Wiggins helped in the coding and processing of the data. Many of them responded at a moment's notice when I needed something done, at some odd hour of the night. Mr. Tempel, especially, could be found in my office late Saturday night or Sunday morning, despite other pressing responsibilities. Madeline Simonson and Selma Lenihan saw to the typing of the manuscript with speed and efficiency, and Ray Albury of the Bureau machine room did some very essential jobs at the moments when I needed him most.

INTRODUCTION

This report is an initial statement of some of the findings of a study of the grand jury panels of Kings County, New York (Brooklyn) from 1958 through 1962. It is limited for the most part to a description of the panels with respect to race, occupation, education, place of birth, and a number of other characteristics, and a comparison of the panels in these respects with the population of potential grand jurors in Kings County.

We hope in future reports -- after further analysis of quantitative data that we have gathered, and are not reported here, and after gathering additional information -- to delve more deeply into the operations of grand juries, their functions in the contemporary American legal system, and their place as institutions in a community. We will then be able to draw on the work of a number of social scientists who have studied trial juries and grand juries, their members, and the relationships and attitudes of citizens to these bodies. Allen Barton, Harry Kalven, Jr., Saul Mendlovitz, Rita Simon, Fred L. Strodtbeck, Hans Zeisel, and others have conducted studies in this area.

The findings of this report will be used in litigation. For the social composition of grand juries has become an increasingly prominent issue during recent years, in litigation, in the work of committees of the Judicial Conference of the United States, and of the American Bar Association, and in legislation. There were provisions in the Civil Rights Act of 1966 which, if passed, would have set standards of representativeness for the grand juries of state courts.

In December, 1966, the Harvard Law Review published an article by Michael O. Finkelstein, an attorney, on "The Application of Statistical Decision Theory To The Jury Discrimination cases." Scarcely a month later, the Supreme Court of the United States had cited this article. That fact suggests how prominent this issue is in American law at the present time.

This report, however, does not deal with any legal issues. Nor does it consider, on any extra-legal basis, what a proper or desirable grand jury panel might be. The concluding section does suggest some sampling procedures that might be used, assuming the goal of a grand jury panel that is a representative cross section of a population. Except for that section, however, this report is limited to an analysis of the descriptive data on the particular grand jury panels in question.

The section which follows summarizes the highlights of the findings. The next section considers in some detail the data we used, and discusses certain methodological questions that these data entailed. The reader who is not concerned with examining our methods might skip this section and go directly to the section on detailed findings.

SUMMARY OF FINDINGS

The data reported below show that between 1958 and 1962 young adults below the age of 35, Negroes, Puerto Ricans, citizens of Italian birth, second-generation Italians, blue collar workers, people in the lower income brackets, and certain other groups were underrepresented on the grand jury panels of Kings County. The data show that whites, white collar workers, white Protestants, and people in the higher income brackets were overrepresented.

Statistical methods provide an indication of overrepresentation or underrepresentation. We observe that in 1961, 1.4% of the panel were Negroes. Assuming, for example, that 30 years is the minimum age for service on the grand jury, that all whites with five years of schooling are eligible, and that only Negroes who have a high school diploma are eligible, we note that the percentage of Negroes in the eligible population, thus defined, is 3.7%. We can then ask, what is the probability of drawing a panel by random selection in which 1.4% or fewer are Negroes from a population in which 3.7% are Negro. How many times in a hundred, or a thousand, or a million can we expect 1.4% or fewer Negroes by random selection? Statistical methods make it possible to answer that question. We can then go on to ask, what would be the probability of so few Negroes, or fewer, in five independent samples of the same population?

Using conservative procedures, we arrive, for example, at the following results for a single annual panel.

Highest % in the panels	Social group or type	Probability
1.4%	Negroes - Assuming that whites need only 5 years of school and Negroes need 12.	Less than .00000029

Highest % in the panels	Social group or type	Probability
0.1%	Puerto Ricans - Assuming that 60% are literate in English	Less than .00003.
1.6%	Citizens born in Italy - Assuming that two thirds are literate in English	.0016
1.2%	Semi-skilled workers	Less than .00000029
2.8%	All blue collar workers	Less than .00000029

The findings for some of the overrepresented groups are as follows.

Lowest % in the panels	Social group or type	Probability
17.5%	College graduates - assuming that only people who have at least graduated from high school are eligible	.00036
18.7%	Professional and Technical workers	Less than .00000029
94.8%	All white collar workers	Less than .00000029

The data on Jews, white Protestants, people on welfare, second generation Italians, and divorced males also show, in varying degrees, deviations from the distribution that one can expect to occur by random selection. And the probabilities for the whole pattern over five years, for repeatedly low or repeatedly high percentages, are astronomically smaller than those listed above.

DATA AND METHODS

The data of this study come from four different sources. First, official lists of the names and addresses of the members of the grand jury panel in Kings County for each of the five years, 1958 through 1962. Second, the fingerprint cards of each member of the panels. These cards are on file at the Bureau of ~~Criminal~~ Identification in Albany. Third, the qualification sheets, or questionnaires, that each member of the panel fills out when he is first called to jury duty, and the revision notices that are attached to these qualification sheets when a panelist reports a change in, for example, his address or occupation. Prospective jurors fill out these qualification sheets when they are called for service on trial juries. Characteristically, they become members of a grand jury panel only after a record of service in trial juries. And most members of the grand jury panel serve, with interruptions, for a number of years. Hence, most of the qualification sheets were filled out some years prior to the years in question in this study. That fact obviously has no consequence for some items of information, such as the country in which a panelist was born. But it was necessary to examine the attached revision sheets when examining panelists' occupations.

Fourth, we also use responses to a mail questionnaire that was sent to a probability sample of all persons who were on the panel during one or more of the years, 1958 through 1962.

The qualification sheets provide information on marital status (including questions on whether or not a panelist has ever been divorced or ever been separated), on sex, year of birth, color,[1] place of birth, education, occupation, whether or not the panelist was on welfare at the time he filled out the questionnaire, and numerous other matters that we do not use in this study. They do not provide information on three other items that are relevant to this study -- income, religion, and parents' place of birth. Moreover, we do not have the qualification sheets for all persons who had been members of the grand jury panel during one or more of the five years, 1958 through 1962. Instead, we have qualification sheets only for those persons who were members of the panel during one or more of these years and were still members of the panel, or were on the alternate list, in 1967. The qualification sheets of the others -- persons who died, who moved out of Kings County, or who are no longer on the panel for some other reason -- were destroyed. It is therefore necessary to show that those who were on the panel during the period in question and are also on the panel (or on the alternate list) in 1967 are a representative sample of the total population of grand jurors during the years in question.

We have 2,131 qualification sheets. There were approximately 5,360 people on the panel during one or more of the years in question. That is, we have qualification sheets for 39.8% of the total number of people whose social characteristics we want to describe. How do we know that this 39.8% is representative of the total?

We answer this question in three ways. First, we have fingerprint cards for virtually all of the people who were members of the panel during the period in question. From the fingerprint cards we know the race and the year of birth of the entire population. With respect to race, Table 1 shows that the 2,131 people for whom we have qualification sheets are quite representative of the total. The percentages in the total panel and in our sample of qualification sheets are virtually identical.[2] As seen below

TABLE 1

RACIAL COMPOSITION OF THE TOTAL PANELS, 1958-1962, AND OF THE QUALIFICATION SHEET SAMPLE

	1958		1959		1960		1961		1962	
	Total Panel	Qualification Sheet Sample	Total Panel	Qualification Sheet SamPle	Total Panel	Qualification Sheet Sample	Total Panel	Qualification Sheet Panel	Total Panel	Qualification Sheet Sample
Race:										
White	97.6%	97.9%	97.4%	97.1%	98.1%	98.7%	97.3%	97.4%	97.8%	98.0%
Negro	1.3	1.7	1.2	1.7	0.9	0.7	1.4	1.5	1.3	1.3
Other	0.1	0.2	0.05	0.1	--	--	0.1	0.2	--	--
Information not available	1.0	0.2	1.3	1.1	1.0	0.5	1.2	0.9	0.9	0.7
	100%	100%	99.95%	100%	100%	99.9%	100%	100%	100%	100%
	(1394)	(765)	(1999)	(783)	(1974)	(941)	(1922)	(887)	(1988)	(1089)

Note: Some percentages in this table and in the following tables add up to slightly more or slightly less than 100% because of rounding.

in the section on age groups, the data on the total panel from fingerprint cards and the data from qualification sheets also tell virtually identical stories about the exclusion of people in their twenties and early thirties from the grand jury panel.

The second way in which we show that the qualification sheets which are available for this study are representative of the total population of grand jurors during the years in question is to compare data from the qualification sheets with data from the sample survey on education and place of birth. These two items appear both on the qualification sheets and on the questionnaire that we used in the sample survey.

Appendix A gives the full details of the sample survey. Briefly, from a master list of all people who served on the panel during one or more of the years in question we drew a probability sample of 2,000 people, and sent them a mail questionnaire.[3] This survey ran into certain problems that we had to overcome. About 600 of the people in the sample of 2,000 had moved, and their questionnaires were not forwardable. Further, the rate of response by people who did not move was rather low. But by a combination of techniques, including phone interviews with sub-samples of people who had moved, and of people who had not moved but failed to answer the questionnaire after a mail follow-up, we were able to overcome these problems. It seems clear that the rate of response, about 35% of the initial sample, does not invalidate the findings. Appendix A gives the exact details of this part of the study, and the reasons for concluding that we may have confidence in the survey data.

Table 2 shows, for panelists' birthplaces, how close the data from the qualification sheets are to the data from the survey. With slight variations, the percentages of people in the survey sample who were born in the various countries or groups of countries are quite close to the percentages for whom we have qualification sheets for the various years.

TABLE 2

COUNTRY OF BIRTH OF MEMBERS OF THE GRAND JURY PANEL, 1958-1962

Country of Birth:	Qualification Sheet Data By Years 1958	1959	1960	1961	1962	Survey Data
U.S.A.	91.7%	89.4%	90.7%	88.9%	90.5%	87.8%
Puerto Rico	0.1	--	0.1	0.1	--	--
Ireland	0.6	1.2	0.5	1.2	0.3	0.9
Italy	0.6	1.1	0.5	1.6	0.4	0.9
Germany	0.2	0.1	0.2	--	0.4	0.1
Scandinavia	0.7	0.2	0.6	0.2	0.8	0.5
Holland	0.1	--	0.2	--	0.1	0.1
British Isles	1.5	1.4	1.5	1.9	1.7	1.1
East.Europe	2.6	4.3	3.4	3.9	3.8	4.7
Greece	--	--	--	0.1	--	--
Other Europe	--	0.1	0.1	0.1	--	0.1
Arab Countries	0.1	0.1	0.1	0.1	--	--
Other Latin Amer.	0.2	0.3	0.1	0.4	0.2	0.1
Other	1.3	1.4	1.3	1.3	1.1	1.5
No answer	--	--	--	--	--	1.6
Total	99.7% (765)	99.6% (782)	99.3% (941)	99.8% (887)	99.3% (1088)	99.4% (716)

It is not possible to make such an exact comparison between the two sets of data as regards education. On the mail questionnaire we used a variation of the question that census enumerators use, "What is the highest grade of regular school you ever attended?" We provided a check list that listed either specific years, such as "8th Grade," or specific levels of education, such as "College incomplete." The qualification sheets ask a somewhat different question. The form reads, "Education: Primary, High School, College, degrees, special studies etc."

In response to a check list on a questionnaire, people sometimes puff themselves up a bit. For example, they might check "College incomplete," even though they had never finished high school but had taken some courses in a night school or an extension school that is associated with a college. Or they might check "Graduate work" if they had completed college and, in addition, had taken some non-academic professional or occupational courses. In response to the item on the qualification sheet, members of the panel tended to include all kinds of courses, including studies at many non-academic institutions.[4] They did so in part because the question asked about "special studies." And some people on the panel indicated that they had taken college courses, even though they had not graduated from high school.

In classifying the qualification sheets we kept special courses or studies at non-academic institutions separate, because we have to compare the education of members of the panels with the census data for the total population of Kings County. The census data refer to "years of regular school." Further, in order to err, if error were necessary, on the side of minimizing the extent to which the highly educated people are overrepresented on the panel, we instructed our coders not to count college courses taken by people who had never graduated from high school, and to code in a downward direction whenever there was any doubt or ambiguity about the highest level of education reported on the qualification sheets. But, of course we had no such control, or detailed information, when it came to people's answers to the question on the mail questionnaire. For these reasons, the two sets of data are not completely comparable.

These differences explain why the two greatest discrepancies between the two sets of data, as seen below in Table 3, are in the percentages who had some high school, and in the percentages who had some college. By "college incomplete," many of the people who answered the mail questionnaire apparently meant special studies of various sorts, which would not have been classified as "some college" according to our rules for coding qualification sheets. Special courses were not classified as "some college" unless they were taken at an academic institution, and unless the panelist had graduated from high school. Thus, some people whom we classified as "some high school" apparently promoted themselves to "college incomplete" on the mail questionnaire. This supposition is supported by the fact that the percentages in these two groups, "some high school" plus "some college" are quite similar-- between 34% and 38% -- in the survey data and in each of the five yearly panels when they are added together.

Similarly, when we add together the percentages in the survey data of those who claim graduate work and those who claimed only to have completed college, the result is quite close to the same totals in the data from the qualification sheets. For in the latter, a college degree plus some non-academic courses did not count as graduate work, but it probably did in the former.

In short, it is easy to explain the discrepancies between the two sets of data. Discrepancies occur among people who do not stand on one of the institutionalized grade levels -- eighth grade, high school, and college-- and therefore place themselves somewhat differently, and higher, than our stricter coding rules allowed for. But when we look along the institutionalized breaks -- completed eighth grade, completed high school, and completed college -- the data of the mail survey and the data of the qualification sheets tell very similar stories. From a little less to a little more than one-fourth completed college. A little more or a little less than 30% completed high school and did not go further. And the percentages who did not go beyond the eighth grade vary from 4.7% to 8.2%, with the survey data between these two points.

TABLE 3

EDUCATION OF MEMBERS OF THE GRAND JURY PANEL, 1958-1962

	Qualification Sheet Data By Years					
Education:	1958	1959	1960	1961	1962	Survey Data
0-8 years	4.7%	8.2%	5.5%	8.6%	5.3%	5.4%
Some high school	19.2	18.6	17.5	18.1	18.6	8.4
High School grad.	32.9	31.2	33.9	29.8	34.7	28.1
Some College	18.5	16.8	17.3	17.5	16.9	27.5
College Grad.	20.7	21.2	21.2	21.5	20.6	17.9
College Plus	3.9	3.9	4.5	4.4	4.0	10.6
No answer	--	--	--	--	--	2.1
Total	99.9% (762)	99.9% (779)	99.9% (937)	99.9% (882)	100.1% (1085)	100.0% (716)

We can be confident, then, that our qualification sheet sample of 2,131 members of the panel is representative of the total population of some 5,360 grand jurors with respect to race, education, and place of birth. For we can compare these 2,131 panelists with the total population (as regards race) or with data from a probability sample of the total population (with respect to education and place of birth). We have still a third basis for confidence that our qualification sheet sample is a representative one.

People who were grand jurors during one or more of the five years in question are in the qualification sheet sample if they are still (or again) on the grand jury panel or are on the alternate list in 1967. People who were on the panel during the years in question are not in our qualification sheet sample if they are neither on the panel nor on the alternate list in 1967. Therefore, to ask if our qualification sheet sample is representative is identical to asking whether or not the social characteristics in which we are interested are statistically associated with dropping out of the panel, or staying on it, between 1958 through 1962, on the one hand, and 1967, on the other. For example, if highly educated people are more likely than people with less education to stay on the panel a long time, then our data from qualification sheets would show a higher percentage of highly educated people on the panels between 1958 and 1962 than was in fact the case.

The survey data speak to this question. For they include a subsample of former jurors who are no longer on the panel, including some who are no longer on the panel because they have moved out of Kings County. They were located for phone interviews in Manhattan, the Bronx, Queens, Nassau County, or Suffolk County.[5] In Appendix A, which gives the details of the survey, these people are tabulated separately. The data presented there show that, as a group, the people who are no longer on the panel are quite similar to those who are. For example, almost 31% of those who are no longer on the panel are Jewish, as compared to 32% for the total of survey response. The percentages who had a family income of less than $5,000 in 1966 are even closer, between 7% and 8% among those who are no longer on the panel and in the total survey response.

With respect to education and place of birth, we therefore have three separate sub-groups -- those who are still on the panel or the alternate list, a group of Kings County residents which include some who are still on the panel or alternate list and others who are not, and a group of people who are no longer on the panel. As the data in Appendix A indicate, these three sub-groups are quite similar with respect to education and place of birth. With respect to income, religion, mother's religion, father's place of birth, and mother's place of birth we have two separate sub-groups -- a group of Brooklyn residents which includes some who are still on the panel and others who are not, and a group of people who are not on the panel. In these respects, too, the two sub-groups are quite similar.

An analysis of turnover from year to year, during the five years in question, of people for whom we have qualification sheets also supports the conclusion that turnover on the panel is not associated in any significant degree with the social characteristics that concern us here. For example, Table 4 shows that turnover is not related to place of birth. Among those who were members of a panel in 1958 (the people in the top rows in the sub-tables in Table 4), those who remained on the panel in 1959 or in 1962 (the people in the upper left boxes in the tables) are quite similar as regards place of birth to those who went off the panel during the subsequent year (the people in the upper right boxes). Both groups, in turn, are similar to those who were not members during the first year but became members during the second. And these three groups are similar to those who were members during the five years in question, but were not members during the two years in question in each of the sub-tables in Table 4.

TABLE 4

TURNOVER IN MEMBERSHIP IS NOT RELATED TO PLACE OF BIRTH
(Qualification Sheet Data)

Percentage Who Were Born in the United States

Turnover from 1958 to 1959

		On the Panel in 1959	
		Yes	No
On the Panel in 1958	Yes	90.0% (200)	92.0% (565)
	No	89.2% (582)	89.2% (784)

Turnover from 1958 to 1962

		On the Panel in 1962	
		Yes	No
On the Panel in 1958	Yes	90.5% (442)	92.9% (323)
	No	90.4% (646)	88.1% (720)

(The numbers in the cells are the totals on which the percentages are based.)

The data on race, education and occupation show still other characteristics that are not related to turnover. For example, among those for whom we have qualification sheets who were on the panel in 1958, 24.3% of those who were also on the panel in 1962 had completed college, as against 25.1%

of those who were not in the panel in 1962. The corresponding percentages for those who had an eighth grade education, or less, are 3.6% and 6.2%. The data on race and occupation (reported in Appendix B) give similar results.

Assuming that there has been no major change in the method of selecting grand jurors between 1962 and 1967, these data support~~s~~ still further our conclusion that the sample of qualification sheets is representative with rsspect to the characteristics that concern us in this study. For the presence or absence of a grand juror in our sample is determined solely by whether or not he is still on the panel (or the alternate list), and turnover is not related to the characteristics in question. This conclusion does not stand on the analysis of turnover alone. It is buttressed by our comparison of the sample with the total panel as regards race,and by the data of the mail questionnaire, as regards education, place of birth, income, religion, and parents' place of birth.

This conclusion is also buttressed by the pattern of dropping off, and returning to, the panel among the 2,131 jurors for whom we have qualification sheets. Table 5 shows that the vast majority of those who were on the panel in 1960, or earlier, were on the panel for more than one year, and that the vast majority of these skipped one or more years between their years of service.[6] Table 6 summarizes some of the things that Table 5 tells us. These data suggest that turnover is not related to social characteristics because most of the movement off the panel does not represent a decision by a grand juror that he does not "belong," or a decision by the Jury Board or other officials that a juror is not of the right type, or is not qualified. The process of selection and self-selection takes place before people become grand jurors in the first place. Rather, movement off the jury, excepting

TABLE 5

PATTERNS OF YEARLY MEMBERSHIP ON THE PANEL AMONG THOSE GRAND JURORS WHO WERE ON THE PANEL IN 1900 OR EARLIER

(Qualification Sheet Data)

Years During Which a Grand Juror Was A Member of the Panel					Number Who Illustrate Each Pattern	Percentage Who Illustrate Each Pattern
1958	1959	1960	1961	1962		
Yes	Yes	Yes	Yes	Yes	1	--
Yes	Yes	Yes	Yes	No	17	10%
Yes	Yes	Yes	No	Yes	51	3.1%
Yes	Yes	Yes	No	No	6	0.4%
Yes	Yes	No	Yes	No	93	5.6%
Yes	Yes	No	No	Yes	29	1.7%
Yes	Yes	No	No	No	3	0.2%
Yes	No	Yes	Yes	No	42	2.5%
Yes	No	Yes	No	Yes	354	22.1%
Yes	No	Yes	No	No	44	2.6%
Yes	No	No	Yes	Yes	1	--
Yes	No	No	Yes	No	90	5.4%
Yes	No	No	No	Yes	6	0.4%
Yes	No	No	No	No	28	1.6%
No	Yes	Yes	Yes	No	18	1.0%
No	Yes	Yes	No	Yes	76	4.6%
No	Yes	Yes	No	No	10	0.6%
No	Yes	No	Yes	Yes	1	--
No	Yes	No	Yes	No	379	22.8%
No	Yes	No	No	Yes	87	5.2%
No	Yes	No	No	No	1	--
No	No	Yes	Yes	No	24	1.4%
No	Yes	No	Yes	No	240	14.4%
No	Yes	No	No	No	58	3.5%
				TOTAL	1659	100.1%

those who die or who move out of Kings County, most commonly represents a "furlough" for a year or two, followed by return to the panel later on. This pattern is institutionalized. It is the custom of the Kings County Supreme Court to work on two lists, and to alternate them such that in any given year one of them is the list for that year. Hence, to take one example from Table 5, among those for whom we have qualification sheets who were on the panel in 1958, the single most frequent pattern is service in 1958, 1960, and 1962. Other people, however, take furloughs without strictly following this institutionalized pattern. For example, among those who were on the panel in 1958, 93 of those for whom we have qualification sheets served in 1958, 1959, and 1961. But whatever the exact pattern, it seems clear that most movement out of the panel represents temporary absence, movement out of Kings County, or death.

TABLE 6

PATTERNS OF MOVEMENT ON AND OFF THE PANEL AMONG GRAND JURORS WHO WERE ON THE PANEL IN 1960 OR EARLIER

(Qualification Sheet Data)

Percentage who served one year and did not reappear through 1962	5.2%
Percentage who served more than two years but in no two consecutive years	72.3%
Percentage who served in two consecutive years but also skipped one or more years	17.6%
Percentage who served two or more consecutive years and never skipped a year	3.1%
Other patterns	1.8%
Total	100% (1659)

For these reasons, movement off the panel is not associated with social characteristics. Hence, if we had qualification sheets for the entire population of grand jurors during the five years in question, or if we had qualification sheets for those who served during those years and also in 1966 or also in 1968, instead of in 1967, our data would be quite similar to the data from qualification sheets that we use in this study. The people for whom we have qualification sheets are a good representative sample of the total population of grand jurors during the years in question.

DETAILED FINDINGS

This section presents in more detail the findings summarized above. It includes findings that bear on age groups, Negroes, Puerto Ricans, Italian-Americans, Jews, White Protestants, occupation and income, educational levels, and marital status.

Age Groups: The data in Table 7 below suggest one respect, year of birth, in which the qualification sheet sample is not representative of the total population of grand jurors during the years in question. The percentages of grand jurors who were 60 years old or older in each of the successive panels goes up steadily from 1958 through 1962. These data do not reflect a change, or such a great change, in the actual age composition of the grand jury panels. They reflect the fact that the earlier panels included a higher percentage of people who died, or who left the panel for reasons of old age, before 1967 than the later panels did.

This observation is quite consistent with the conclusion that the qualification sheet sample is representative, because turnover is not significantly associated with the social characteristics that concern us here. In fact, this observation tends, if anything, to buttress that conclusion still further. For if various social characteristics do not account for who stays on the panel from year to year, and for who goes off, then one wants to know, what does account for turnover? The data in Table 7 suggest that the answer is, in part, death and old age.

Despite the differences in Table 7 in the percentages of jurors who are 60 years old or older, that table shows remarkable stability from year to year in the younger age groups. It shows a virtual exclusion of persons under the age of 35 in each of the five panels in question. The governing statute specifies the age of 21 as the minimum age for service on the grand jury, but the operating minimum is 35 or, at the lowest, 30.

TABLE 7

AGE OF MEMBERS OF THE GRAND JURY PANEL

(Data from Qualification Sheets)

Age	1958	1959	1960	1961	1962
21-24	--	--	--	--	--
25-29	--	--	--	--	--
30-34	0.8%	0.1%	1.2%	0.8%	1.4%
35-39	4.6	4.5	4.7	4.4	4.6
40-44	9.3	7.9	10.5	8.7	8.9
45-49	23.5	18.1	18.7	12.8	13.4
50-54	30.0	29.0	28.1	26.8	23.4
55-59	26.0	30.3	23.2	27.0	25.1
60 plus	5.9	10.1	13.6	19.5	23.2
Total	100.1% (766)	100% (783)	100% (942)	100% (888)	100% (1089)

Table 8 tells the same story in a different way. That table presents data, not on the age of the grand jurors during each of the five years in question, but on the age at which they first went on the grand jury panel. That is, the columns in that table for any given year include a number of people who were, say, 50 through 54 years old during a given year but are listed under the age group 45-49, because they had first gone on the panel a few years earlier. As seen in that table, people virtually never go on the panel before they are 30 years old. And only very few, roughly 5%, were under 35 when they first went on the panel. The percentage who first went on the panel between the ages of 35 and 39 is also fairly small (roughly 10%). Sizeable percentages do not appear until the age group, 40 through 44 years.

The data from the Bureau of ~~Criminal~~ Identification on the total population of grand jurors during the five years in question are quite similar to the data from the qualification sheets. They indicate slightly less than 4% of the total were born in 1924, or later, and would therefore have been 34 years old, or younger in 1958. But, of course, only a small fraction of those born in 1924 or later (less than 20%) served on the panel as early as 1958. The data on the total population of grand jurors also indicate that about 1.7% were born in 1928 or later, and therefore would have been 34 years old or younger in 1962. That figure is in line with the figure of 1.4% in Table 7. We can therefore be certain that the data in Table 7 are an accurate statement of the virtual exclusion of people below the age of 35 from the grand jury panel.

TABLE 8

AGE AT WHICH GRAND JURORS FIRST BECAME MEMBERS OF THE PANEL

(Data from Qualification Sheets)

Age of first membership on the panel	1958	1950	1960	1961	1962
21-24	--	--	--	--	--
25-29	0.1%	--	0.1%	--	0.1%
30-34	4.8	4.4	4.9	3.7	5.6
35-39	9.8	10.6	11.3	10.4	11.3
40-44	21.5	23.8	19.6	20.7	18.9
45-49	29.9	26.1	28.1	25.1	24.8
50-54	22.7	21.6	20.6	23.8	19.9
55-59	9.8	11.2	12.0	12.0	12.9
60 plus	1.1	2.0	3.0	3.9	6.3
Total	99.7% (765)	99.7% (781)	99.6% (941)	99.6% (886)	99.8% (1088)

Table 9 indicates the extent of that exclusion. That table shows that almost 39% of the population of Kings County, aged 21 years or order, was below the age of 34 in 1960, as against 2% or less on the panels.[7] Over 17% are below 30, as against none on the panels.

TABLE 9

SIZE OF AGE GROUPS, 21-34 YEARS, IN KINGS COUNTY IN 1960

(U.S. Census Data)

Age Group	Percentage in Total Population Aged 21 years or older
21-24	7.6%
25-29	9.8
30-34	10.5
35 and older	71.2
Total	100% (1,743,758)

The exclusion of people who are below 30, and the virtual exclusion of people between the ages of 30 and 34, means that the most highly educated age groups in the county are kept off the panel. As seen in Table 10, in the population, 25 years and older, there is a clear, stepwise relationship between age and education. The median number of years of school is higher in the younger groups and is lower in the older. Or, looking at the same phenomenon in another way, although people aged 24 through 29 are 9.8% of the population of Kings County aged 21 years or older, they constitute 19% of the population aged 21 years or older who have had two years, or more, of college.[8]

The excluded age groups differ from older age groups in other ways as well. Young adults are less likely to own a home, to be committed to a specific career line, or to have heavy family responsibilities. They are more likely to explore the world -- to change their residence,[9] get a new job, or join a Great Books Discussion Club;[10] and are more likely to live in heterogeneous social environments -- to have friends whose party preferences are not their own,[11] or to go to persons of a different age group to discuss presidential campaigns.[12]

TABLE 10

MEDIAN YEARS OF SCHOOL OF VARIOUS AGE GROUPS IN KINGS COUNTY IN 1960

(U.S. Census Data)

Age Group	Male	Female
25-29	12.2%	12.1%
30-34	11.8	11.9
35-44	11.1	11.1
45-54	9.3	9.1
55-64	8.5	8.4
65-74	7.5	7.3
75 and older	5.9	7.1

Perhaps because their social ties bind them less strongly, voters who are less than 35 years old are less likely than older voters to be influenced by the dominant political trend of their own communities or of their own religious group.[13] And in their opinions on a wide variety of matters, young adults are less likely than older adults to align themselves with strength, power, and authority, or with prevailing opinions in their community. They are less likely to agree that "People can be divided into two classes--the weak and the strong," or that "A child should never talk back to his parents," and they are more likely to support the civil liberties of political dissenters.[14]

The virtual exclusion of people below the age of 35 from the grand jury panel is, therefore, also an exclusion of people who tend to have a somewhat different way of life, and somewhat different opinions and outlooks, from older people. This exclusion is also related to discrimination against Negroes. The next section of this report will demonstrate, using various definitions of the eligible population, the astronomically small probability that the percentage of Negroes on the grand jury panels during the years in question could come about by random selection. But if qualified Negroes and whites were chosen for the grand jury panel by random selection, the exclusion of people under 35 would still result in an over-representation of whites on the grand jury panel, relative to the total population of Kings County aged 21 years or more. For, as seen in Table 11, Negroes in Kings County tend currently to be somewhat younger than native whites, and considerably younger than foreign-born whites. Looking at the same thing in another way, although Negroes constituted slightly more than 14% of the population in 1960, they constituted 18% of the population aged 25 through 29, and almost 19% of the population aged 30 through 35. Hence, a random selection limited to qualified persons over 30, or over 35, would result in an under-representation of Negroes on the grand jury panel.[15]

TABLE 11

MEDIAN AGE OF THE KINGS COUNTY POPULATION AND OF VARIOUS CATEGORIES WITHIN THE POPULATION, 1960

(U.S. Census Data)

	Male	Female
Total Population	32.4%	34.4%
Foreign Born White	58.9	58.7
Native White	27.0	29.6
Negro	24.1	26.8

Negroes: As seen above in Table 1, during the five years in question Negroes never constituted as much as 2% of the panels. According to the data from fingerprint cards on the total panels for each of these five years, the highest percentage was 1.4% (in 1961) and the lowest was 0.9% (in 1960). In contrast, in Kings County in 1960 14.5% of the population were non-white, of whom 14.1% were Negro.[16]

We will use these data from the 1960 census in order to gauge the extent to which Negroes were underrepresented on the grand jury panels during the years in question. But the 1964 population survey of the New York City Department of Health suggests quite strongly that the data from the 1960 census understates the percentage of Negroes in Kings County during 1961 and 1962. The Department's survey indicates that between 1960 and 1964 the percentage of non-white in the population of Kings County (excluding Puerto Rican non-whites) rose from 14.3% to 20.3%.[17] Assuming that this increase took place more or less steadily between 1960 and 1964, the approximate percentages of non-whites in Kings County would be 15.8% in 1961 and 17.3% in 1962. Hence, our comparison of the percentage of Negroes on the grand jury panels in 1961 and 1962 with the percentage of Negroes in the population as reported in the 1960 census probably minimizes the true extent of under-representation during 1961 and 1962.

Using the 1960 figures, the percentages of Negroes in the population that are relevant for comparison with the percentage on the grand jury panels are somewhat lower than the overall 14.1%. For, as seen above in Table 11, during the years in question Negroes in Kings County tended to be younger than whites. A higher percentage of Negroes than of whites were too young to be eligible for service on the grand jury. Using, first of all, the criterion of age 30, the lowest age among members of the panel, among adults in Kings County who were that old, or older, in 1960, 10.9% were Negroes, in contrast to 1.4%, the highest observed percentage of Negroes on the grand jury panel.

The probability of drawing so few Negroes, or fewer, from a population that includes 10.9% Negroes, is less than .00000029. That is, the difference between 10.9% Negroes in the population aged 30 or older and 1.4% Negroes, or fewer, on the grand jury panels could occur by random selection less than three times out of ten million.[18]

The probability that such a pattern could occur by random selection five years in a row is even more astronomical. One calculates the probability of two independent events by multiplying the probability of one by the probability of the other. For example, if the probability that a mother's next child will be a son is one half, or .50, then the probability of her having two sons in a row is (.50 x .50), or .25.

Two successive grand jury panels in two successive years are not two independent events. For, as seen above in Table 6, there is a considerable built-in carryover of members from one year to the next, and even more built-in panels in 1961 and 1962 with the percentage of Negroes in the population as reported in the 1960 census probably minimizes the true extent of under-representation during 1961 and 1962.

Using the 1960 figures, the percentages of Negroes in the population that are relevant for comparison with the percentage on the grand jury panels are somewhat lower than the overall 14.1%. For, as seen above in Table 11, during the years in question Negroes in Kings County tended to be younger than whites. A higher percentage of Negroes than of whites were too young to be eligible for service on the grand jury. Using, first of all, the criterion of age 30, the lowest age among members of the panel, among adults in Kings County who were that old, or older, in 1960, 10.9% were Negroes, in contrast to 1.4%, the highest observed percentage of Negroes on the grand jury panel.

The probability of drawing so few Negroes, or fewer, from a population that includes 10.9% Negroes, is less than .00000029. That is, the difference between 10.9% Negroes in the population aged 30 or older and 1.4% Negroes, or fewer, on the grand jury panels could occur by random selection less than three times out of ten million.[18]

The probability that such a pattern could occur by random selection five years in a row is even more astronomical. One calculates the probability of two independent events by multiplying the probability of one by the probability of the other. For example, if the probability that a mother's next child will be a son is one half, or .50, then the probability of her having two sons in a row is (.50 x .50), or .25.

Two successive grand jury panels in two successive years are not two independent events. For, as seen above in Table 6, there is a considerable built-in carryover of members from one year to the next, and even more built-in carryover in the membership of three consecutive panels. To be sure, a certain percentage each year are newcomers, who have never been on the panel before. We might, therefore, consider the percentage of Negroes among the newcomers every year, over a number of years, to be a succession of independent events, and calculate the probability of drawing as few or fewer Negroes for a number of years in a row. But newcomers are a very small percentage on each year's panel. For example, the data in Table 5 show that only 2.5% (24 out of 941) of our qualification sheet sample for 1960 had been on the panel neither in 1958 nor in 1959. To calculate probabilities over a period of years on the basis of newcomers alone would therefore not tell us much about the panels as a whole.

We will therefore calculate probabilities over a period of years as if each annual panel were an independent event. The results show us the number of times out of a thousand, or a million, or ten million which a succession of panels over the years having, for example, 1.4% Negroes, or fewer, could be expected by chance if each annual panel were an independent sample of the eligible population of Kings County. The probability for any single year indicates the extent to which the percentage of Negroes (or of young adults, or of Puerto Ricans, etc.) deviates from percentages that one could reasonably expect if panels were randomly drawn from the eligible population. The probability for five years shows the effects not only of underrepresentation in a given year, but also of a system of built-in carryover from one year to the next, when the first annual panel in the sequence underrepresents various groups in the eligible population.

In this sense, and with this meaning, we can calculate the probability of five grand jury panels five years in a row having 1.4% Negroes by multiplying the probability for one year by itself five times. That number is $.00000029^5$, or less than .00000000000000000000000000000000212184, or about two times in one hundred million trillion trillion.

The astronomically low probability of drawing by random selection five independent panels having the small percentage of Negroes that we observe continues to hold when we alter our assumptions about the eligible population. If we consider 25 years, or 35 years to be the minimum age for service on the grand jury, then Negroes are still underrepresented to an extent that could never occur by chance. Similarly, if we assume that the education of Negroes is so inferior to the education of whites that Negroes must have more than an eighth grade education, or must have a high school diploma, while whites need not, Negroes are still underrepresented.

Table 12 sums up the results of our probability calculations under various assumptions about age and about the educational requirements of Negroes. In each case it is assumed that all whites who have a fifth grade education, or more, are sufficiently educated to serve on the grand jury, but that Negroes need more than an eighth grade education (the first column in Table 12), or a high school diploma (the second column in Table 12), or at least some college (the third column in Table 12).

As seen in Table 12, if we assume that non-whites need more than 8 years of schooling, or if we assume that they need a high school diploma, to serve on the panel but that whites need only 5 years of school, the representation of Negroes on the grand jury panels from 1958 through 1962 is still smaller than a random selection would produce. The probabilities for a single year remain, under each of three assumptions about minimum age for service on the jury, less than three in ten million.

TABLE 12

PROBABILITY OF DRAWING A PANEL HAVING 1.4% NEGROES, OR FEWER, UNDER VARIOUS DEFINITIONS OF THE ELIGIBLE POPULATION

Three Assumptions about Educational Criteria of Eligibility for Service on the Grand Jury

		All whites who have 5 years of school, or more, and:					
		Only non-whites who have more than 8 years of school		Only non-whites who have a high school diploma		Only non-whites who have some college	
		% of this population who are non-white according to the 1960 Census	Probability of drawing 1.4% non-white, or fewer, from this population	% of this population who are non-white according to the 1960 Census	Probability of drawing 1.4% non-white, or fewer, from this population	% of this population who are non-white according to the 1960 Census	(Non-whites overrepresented) Probability of drawing 1.4% non-white, or more from this population
Three Assumptions About Minimum Age For Service on the Grand Jury	25 years	7.6%	less than .00000029	4.3%	less than .00000029	1.2%	approximately .23
	30 years	6.6%	less than .00000029	3.7%	less than .00000029	1.0%	approximately .68
	35 years	6.6%	less than .00000029	2.9%	less than .00000029	0.8%	.01

Only in the two upper cells of the rightmost column in Table 12 are Negroes present in the grand jury in proportion to their numbers in the hypothetical population of eligible citizens. That is, if we assume what is not true, that whites need only five years of schooling and that Negroes need at least some college in order to serve on the grand jury, then and only then would we draw a panel that consisted of 1.4% Negroes, or fewer, a reasonable number of times out of a hundred (about 20 times out of a hundred if we assume 25 years as the minimum, and almost 70 times out of a hundred if we assume 30 years). And Negroes are overrepresented to a statistically significant degree only if we assume 35 years as the minimum age, 5 years of schooling as the minimum for whites, and some college as the minimum for non-whites.

If we assume that higher educational standards are needed for whites as well, then the extent of the underrepresentation of Negroes is of course increased. For example, among persons aged 25 through 29 in Kings County in 1960, 14.5% of the high school graduates were non-white. Among all those with a completed college education aged 25 years or more, 5.7% were non-white. Defining the eligible population to include only those with a college education, 25 years or older, a grand jury panel that included 1.4% Negroes, or fewer could (as with most of our other assumptions) come about by random selection less than three times in ten million.

This study does not examine the processes that lead to the improbably low percentage of Negroes that we observe on the five panels, or to the exclusion of young adults, or to other results reported below. It examines only the results themselves. It should be noted, however, that it was possible for anyone to tell at a glance from court records the race of the vast majority of the members of the panel who served during the years in question.

Race is noted on the excerpts from fingerprint cards that were attached to the majority (about 80%) of the qualification sheets that we analyzed for this study. Moreover, on the top front page -- second line, second question from the left -- there is, on most of the qualification sheets we analyzed, a question that asks, "Color." That question was dropped in 1956. But very few of the people who were on the grand jury panels between 1958 and 1962 had filled out their qualification sheets after 1956. Therefore, the question that asks about color was both present and answered on 85.9% of the 2,131 qualification sheets that we examined. But, as seen in Table 13, the percentage of qualification sheets for the various annual panels on which the question about color is present and answered remains higher than 85.9% until 1962. The percentages given in Table 13 are, of course, minimum percentages. For former members of the panel who for reasons of death and old age left the panel before 1967 are not included. These people had in all likelihood filled out most of their qualification sheets before 1956, or at least a higher percentage of them than of the younger group had done so.

TABLE 13

PERCENTAGE OF QUALIFICATION SHEETS ON WHICH QUESTION ABOUT COLOR IS PRESENT AND ANSWERED

Year of Panel -	1958	98.2% (765)
	1959	97.7% (783)
	1960	89.9% (941)
	1961	88.3% (887)
	1962	83.5% (1089)

What is more, as seen in Table 14, during the period in question the percentage of newcomers to the annual panels who were Negroes according to the question on the qualification sheets was quite close to the percentage of holdovers who were Negroes, and to the percentage of Negroes in the total panels as reported in Table 1, above. For these various reasons, then, we can assert confidently that the underrepresentation of Negroes on the grand jury panels from 1958 through 1962 did not represent the temporary vestiges of an earlier era that ended in 1956 when the question about color was taken off the qualification sheets.

TABLE 14

QUALIFICATION SHEET QUESTIONS ABOUT COLOR, FOR HOLDOVERS AND OTHERS IN THE SUCCESSIVE YEARS

	Year of Panel			
	1959		1960	
	Percent Negro According to Question on Qualification Sheet	Percent for whom there is no question on Qualification Sheet	Percent Negro According to Question on Qualification Sheet	Percent for whom there is no question on Qualif. Sheet
Members of the panel who had been on the panel the previous year	3% (200)	1% (200)	0 (102)	6.9% (102)
Members of the panel who had not been on the panel the previous year	1.2% (582)	2.9% (582)	1.1% (839)	10.6% (839)

Puerto Ricans: As seen above in Table 2, during each of the five years in question, the grand jury panel contained an infinitesimal percentage of people born in Puerto Rico. The maximum is about one-tenth of one per cent. In contrast, about 6.9% of the population of Brooklyn were Puerto Ricans, as defined by the Census Bureau, in 1960.[19] But this comparison is not sufficient. For the definition of "Puerto Rican" is not precise. And, whatever the definition, some Puerto Ricans are not eligible for the grand jury because they are not literate in English.

For purposes of this study, however, it is not difficult to define "Puerto Rican." As seen above in Table 8 and in Table 9, the grand jury panel includes hardly any people between the ages of 30 and 34, and never or almost never includes people below the age of 30. In the age groups that are included on the panel, a Puerto Rican is, for all practical purposes, a person who was born in Puerto Rico. For the immigration from Puerto Rico to New York City began in large numbers only after the second World War. Hence, among people whom the Census Bureau classifies as Puerto Ricans, the vast majority of those who were 30 years old or older, in 1960, were born on the island. Table 15, below, gives the exact details.[20]

TABLE 15

PLACE OF BIRTH OF PUERTO RICANS IN KINGS COUNTY IN 1960
WHO WERE 30 YEARS OLD OR OLDER
(Census Data)

	Number	Percent
Born in Puerto Rico	51,641	96.6%
Not born in Puerto Rico	1,832	3.4
Total	53,473	100%

There are no exact data on the number of Puerto Rican adults in Kings County who are literate in English. Dr. Max Wolff, Director of Research of the Commonwealth of Puerto Rico Office in New York City, estimates on the basis of his experience in surveys of the Puerto Rican population that about 75% are literate in English. Using that estimate, in 1960 there were about 38,730 adults in Kings County who were born in Puerto Rico and were literate in English.[21] These 38,730 people are about 2.7% of the 1,440,191 adults in Kings County who were 30 years old or older in 1960. These 2.7% provide only 0.1% (or less) of the members of the grand jury panel during each of the years in question. The chances of drawing as few, or fewer, adults born in Puerto Rico by random selection from the Brooklyn population are less than .00003, that is, less than three in one hundred thousand.[22]

If we assume that instead of 75% of the Puerto Rican adults, only two-thirds are literate in English, the relevant percentage in the population aged 30 years or more is 2.4%. That assumption does not change the conclusion that Puerto Ricans are underrepresented to a greater extent than would be expected by chance. Under that assumption, too, the chances of drawing as few, or fewer, Puerto Ricans as we observe on the grand jury panels are less than 3 in one hundred thousand.[23]

Similarly if we assume that only 60% of the Puerto Rican adults are literate in English, the relevant percentage in the population is 2.2%, as against 0.1% or less in each of the annual grand jury panels. The probability of drawing a panel in which 0.1% were born in Puerto Rico from a population in which 2.2% are literate Puerto Ricans born in Puerto Rico is also less than .00003. And if we assume that only 50% are literate in English, then the probability of drawing a panel in which only 0.1% or fewer were born in Puerto Rico is less than .00023, or less than roughly two times in ten thousand.

The results would be similar if we compared the percentage of those born in Puerto Rico on the grand jury panels with the percentage born in Puerto Rico in the population aged 35 and over, instead of the population aged 30 and over. For the Puerto Rican population (as defined by the Census Bureau) aged 35 and over, those born in Puerto Rico constitute 97.2% as against 96.6% among those who are 30 and older. The definition of "Puerto Rican" in the age groups that are included on the grand jury panels as a person who was born in Puerto Rico continues to hold, and the extent of the exclusion of Puerto Ricans remains roughly the same, or even becomes slightly greater, when we use 35 as our minimum age.

Italian-Americans: As seen above in Table 2, the percentage of panel members who were born in Italy varies from about one-half of one per cent to about one and one-half per cent. And the data of the mail questionnaire which are also reported in Table 2 corroborate this finding.

In order to estimate the extent of underrepresentation of citizens of Italian birth on the grand jury panels, it is necessary to have estimates of the number of aliens, and of the number of aliens of Italian birth, in Kings County. Thus far, we have been able to ignore the problem of aliens, even though aliens are not eligible for service on the grand jury. Our ignoring this issue has, in fact, resulted (if anything) in an understatement of the extent of discrimination against Negroes and Puerto Ricans. For virtually all Negroes and Puerto Ricans are American citizens. But we have calculated their percentage in a population that included aliens. Hence, their true percentage in the population of citizens is slightly greater than the percentages we have used. The extent of their underrepresentation ~~then~~ is therefore slightly greater than it appears to be in our data.

On the question of age groups, too, our ignoring the problem of aliens understates the percentage of the citizen population -- young adults aged 21 through 34 -- which is excluded by virtue of age. For, as seen above in Table 11, the foreign born in Kings County in 1960 were considerably older than the total population. Hence, if we excluded aliens from the total population, the percentage between 21 and 34 would be somewhat higher than the percentages that are reported above in Table 9.

With respect to Italians, however, we must take into account the number of aliens. The closest available estimates of the number of aliens in any area are the alien registration cards that all aliens must submit every year in January. The Immigration and Naturalization Service does not ordinarily tabulate these cards within counties. Therefore, no exact figures are available for the period, 1958 through 1962. In 1965, however, the Immigration and Naturalization Service, at the request of the Judiciary Committee of the United States Senate, did tabulate and publish data on aliens within each county.[24] We can use their figures for Kings County in 1965 as the nearest available estimate of the number of aliens, and of the number of aliens born in Italy, during the period in question. The figures are probably not too far off. The foreign-born in Kings County are disproportionately old, and a number have presumably died between 1960 and 1965. On the other hand, there was presumably immigration of aliens into Kings County during the same period.

According to census figures, there were 466,227 foreign-born people in Kings County in 1960.[25] Using the data of the Immigration and Naturalization Service for 1965, 127,764 were aliens. That leaves 388,463 foreign-born citizens, and 2,501,466 citizens in a population of 2,628,230. Foreign-born citizens, then, were about 13.4% of the population of citizens in 1960.

By far, the largest single group of foreign born in Kings County are the Italians. According to census figures, there were 120,766 foreign-born Italians in Kings County in 1960.[25] Following the data of the Immigration and Naturalization Service, 25,751 of these were aliens. That leaves approximately 95,015 Italian born citizens in Kings County in 1960.

These 95,000 citizens born in Italy constitute about 28% of all the foreign-born citizens in Kings County, as against 7.7% of the foreign-born citizens on the panel in 1958; 10.8% in 1959; 6.6% in 1960; 15.0% in 1961; and 4.8% in 1962. The probability of drawing the largest percentage, 15% (in 1961) from a population of foreign-born citizens in which Italian born citizens are 28% of the total is .0070, or about 7 times in a thousand. The probability of drawing the next smaller percentage, 10.8% (in 1959) is less than .00000029, or less than roughly three in ten million.

The 95,000 citizens born in Italy constitute 3.8% of all citizens, native-born and foreign-born together. Taking the largest percentage of Italian-born citizens that we observe in all five panels, 1.6% in 1961, the probability of drawing as few Italian-born citizens, or fewer from a population in which 3.8% of the citizens are Italian-born is also less than .00000029. But let us assume that only two-thirds of the Italian-born citizens are sufficiently literate in English to qualify for service on the grand jury. This assumption almost certainly underestimates literacy, because a literacy test is required for citizenship. But under this assumption, there would be 63,270 citizens born in Italy who are literate in English. These 63,270 citizens constitute 2.5% of all the citizens, native-born and foreign born. Taking once again the highest percentage of Italian-born citizens that we observe on the five panels, the probability of drawing a panel that includes 1.6% Italian-born citizens from a population in which 2.5% were born in Italy is .0016, less than two times in a thousand, or 16 times in ten thousand. If we assume that only half the Italian-born citizens are sufficiently literate in English, then the probability of drawing a panel on which 1.6% of the members were born in Italy is .5156. That is, as few people born in Italy, or fewer, would come up about half the time. However, the probability of such a small percentage or a smaller one five times in a row is .039, or thirty nine times out of a thousand. Hence, even if we assume that only half the citizens born in Italy are sufficiently well-educated and sufficiently literate in English, the repeated pattern over the five-year period indicates that they are underrepresented on the grand jury panels, by comparison with what the five panels would be if they were five independent samples of the population of citizens.

When we consider second-generation Italians we can assume that virtually all are literate in English. According to the census data, there were 251,752 natives of Italian parentage in Kings County in 1960.[26] These second-generation Italians constitute 11% of all citizens. The 716 responses to the mail questionnaire indicate that about 8% of those who were on the grand jury panels between 1958 and 1962 were native-born citizens who had Italian-born fathers.[27]

The probability of drawing this sample, in which 8% or less are native-born with Italian-born fathers, from a population in which 11% are native-born with Italian fathers is .0118, or slightly more than one in a hundred, about 12 times in a thousand.[28] The data indicate, in short, that while the underrepresentation of second-generation Italians is not so great as the under-representation of citizens of Italian birth, the tendency to include fewer Italians on the panels than one would expect by chance does carry over to the second generation.

Jews: According to the data of the mail questionnaire, about 33% of the total population of grand jurors during the five years in question were Jewish.[29] As seen below in Appendix A, the various sub-groups within the mail survey are quite consistent in this respect. There is no significant difference between those who returned their questionnaire before the mail follow-up, those who returned their questionnaire after the follow-up, those who were interviewed by phone because their address had changed, and those who were interviewed by phone because they did not respond to the mail follow-up. There is also virtually no difference between those who are still on the panel or alternate list in 1967 and those who are not.

No complete religious census of New York City or of Kings County for recent years is available. The Reverend Charles Thorne, Director of Research of the Protestant Council of the City of New York and the Reverend Leland E. Gartrell, Director of the Department of Church Planning and Research of the Protestant Council, make estimates of the religious composition of the city, of the various boroughs, and of areas within boroughs. In order to do so, they combine a variety of methods. They work from religious censuses of earlier decades, reported in Population of the City of New York, 1890-1930,[30] and are able to follow some changes in religious identification through the years by following changes in the ethnic or nationality composition of the various boroughs. They draw on studies of particular ethnic groups. And they conduct their own censuses in particular neighborhoods.[31] In their experience, the censuses they take of particular neighborhoods are in line with the distribution of religious identification, and of religious affiliation, that they had estimated by the same methods that they use for the entire city, for each borough, and for areas within boroughs. Their estimates would seem to be reliable.

The Reverend Gartrell estimates that in 1960-61, 24.1% of the population of Brooklyn were Protestant or Orthodox; 39.7% were Catholic; 34.0% were Jewish; and 2.2% were "Other."[32] An earlier estimate for 1957, which the Reverend Gartrell considers to be superseded because of improvements in his methods since it was made, gave slightly different figures for Protestants and Catholics, but a virtually identical figure, 33.9% for Jews.[33] These percentages refer to religious identification. They do not refer to religious affiliation -- e.g., actual membership in a parish or synagogue. They are therefore comparable to the data from our survey.

It would seem at first glance, therefore, that Jews were represented on the grand jury panels during the years in question in almost exact proportion to their frequency in the total population of Kings County. About 33% of the members of the panel, and about 34% of the total population, were Jewish. But that conclusion is not correct.

The virtually total exclusion of Puerto Ricans and the near exclusion of Negroes from the grand jury panels were demonstrated above. These two groups include almost no Jews. Therefore, assuming as our standard not the total population of Kings County but the population from which over 98% of the members of the panels are drawn, the percentage of Jews in the relevant population is considerably higher than 34%.

If, from the total population of Kings County, we deduct the 14.3% who are Negro and the 6.9% whom the Census Bureau defines as Puerto Rican, we are left with 78.8% of the total population. We can round that figure up to 80%, in order to take account of the fact that the population from which the panels are drawn does include a tiny percentage of Negroes and Puerto Ricans. Calculating on that basis, the 34 Kings County residents in every 100 who are Jewish constitute 42.5% of the white, non-Puerto Rican population from which the grand jury panel is drawn, as against 33% of those who were on the panel during the years in question. The probability of our survey drawing so few Jews, or fewer, from the white, non-Puerto Rican population is smaller than .00000029, or less than 29 times out of one hundred million. Jews are underrepresented, when we consider the portion of the population--white and non-Puerto Rican-- from which almost all the members of the panel are drawn.

White Protestants: The data of the mail questionnaire indicate that 24% of the members of the panel during the years in question were Protestants.[34] That is, the percentage of Protestants on the panels during these years was about the same as the percentage of Protestants and Orthodox in the total population of Kings County. That is true, even though the panel virtually excludes, or at the very least underrepresents in extreme degree, one group in the population--Negroes--which is overwhelmingly Protestant.

White Protestants, as opposed to all Protestants, are a fairly small minority in the total population. They constitute somewhere between 12% and 15% of the total. We can arrive at that estimate by working from the Reverend Gartrell's estimate that about 75% of the non-white population of New York City is Protestant by identification. Seventy-five percent of 14.5%, the percentage of non-whites in the population of Kings County in 1960, is almost 10.9% of the total. If we subtract 10.9% from 24.1%, estimated percentage of Protestants and Orthodox, the result is 13.2%.

But we would have to subtract a little in order to take account of the fact that some of these are Orthodox. Or perhaps add a little to allow for error and avoid overstating the extent to which the white Protestants are overrepresented. Between the two, an estimate of 12% to 15% white Protestant seems reasonable, and the upper limit is conservative for purposes of calculating the extent of their overrepresentation.

Using the larger percentage estimate, the probability of drawing a sample (size 716) in which 24% are Protestants from a (non-white) population in which 15% are Protestants is less than .00000029, or less than three times in ten million.

Occupation and Income: Given the exclusion or near exclusion of Negroes, and Puerto Ricans, it is of course not surprising that people in blue collar occupations and people with low incomes were extremely underrepresented on the five grand jury panels in question. The exclusion of young adults also operates to reduce the representation of people in the lower income levels, since young adults tend to have smaller incomes than people in their middle years who are of the same general social class.

Table 16 gives the distribution of occupations, as classified according to the standard U.S. Census Bureau categories, for each of the five panels.[35] Table 16 does not include 208 people for whom we have qualification sheets who were not in the labor force when they first filled out their sheets and whose Revision Notices did not indicate that they had since gone into the labor force. These 208 people, of whom 199 were housewives, constitute 9.7% of the entire qualification sheet sample. Their percentages in particular years vary from a low of 5.6% in 1959 to a high of 9.6% in 1961. The table does include 39 members of the sample whose occupations we could not classify in terms of the census categories, or whose answers were not legible.

TABLE 16

OCCUPATIONAL COMPOSITION OF FIVE GRAND JURY PANELS (EXCLUDING THOSE NOT IN THE LABOR FORCE) AND OF THE KINGS COUNTY LABOR FORCE

	Qualification Sheet Data					Census Data
	1958	1959	1960	1961	1962	Residents of Kings County In the Labor Force in 1960
Professional, Technical and kindred	18.7%	18.9%	21.0%	20.8%	21.3%	9.0%
Managers, Proprietors, Officials	42.1	39.0	39.8	38.7	34.2	7.6
Clerical	23.0	29.4	25.6	27.0	30.0	21.4
Sales	11.0	8.9	9.6	9.0	9.7	7.3
Craftsmen, Foremen and kindred	1.7	1.2	1.2	1.4	1.7	11.3
Operatives and Kindred	1.1	0.9	0.7	1.2	1.0	22.8
Laborers	0.0	0.0	0.0	0.0	0.0	4.0
Private Household Workers	0.0	0.0	0.0	0.0	0.0	1.5
Other Service Workers	0.1	0.1	0.0	0.1	0.0	8.0
Illegible or not classifiable (qualification sheets): not reported (census)	2.4	1.6	2.1	1.8	2.1	6.9
	100.1%	100%	99.9%	100%	100%	99.8%
Total	(718)	(738)	(854)	(801)	(985)	(1,046,724)

As Table 16 shows, no unskilled laborers and no household workers appeared in the qualification sheet sample. There was a maximum of 1.2% "Operatives and Kindred" (roughly, semi-skilled workers) as against 22.8% among the residents of Kings County who are in the labor force. On the other extreme, the higher ranking and better paid occupational categories, "Professional Technical and Kindred," and "Managers, Proprietors, Officials," are overrepresented by comparison with the Kings County labor force. Professionals are overrepresented even though people in three major professions (medicine, the law, and teaching) are almost never on the grand jury panels.

Taking the lowest percentage of "Professional, Technical, and Kindred" workers (18.7% in 1958), the probability of drawing a panel in which as many (or more) professional and technical workers from a labor force in which 9.0% of all workers are professional and technical is much less than .00000029, or less than three in ten million. Taking the highest percentage of "Operatives" (1.2% in 1961), the probability of drawing a panel in which there are as few or fewer "Operatives" from a labor force in which 22.8% are workers of this type is also much less than three in ten million. If the five panels were five independent samples, the probability of such distributions five times in a row would be, like the probability of less than 2% Negro five times in a row, astronomical. It is way, way beyond .00000000000000000000000000000000212184, or two times out of one hundred million trillion trillion.

But the occupations of some of the people in our sample could not be classified, and the occupations of almost 7% of the residents of the Kings County who are in the labor force are not reported. Table 17 simplifies the occupational categories into two, white collar and blue collar. If we assume that all of the members of the grand jury panel in Table 16 whose occupations are not classified were blue collar workers, and if we assume that all the people in the Kings County labor force whose occupations were not reported were white collar workers, and if we take the highest observed percentage of blue collar workers on the panel (2.9% plus 2.4% not classified, in 1958), then the probability of drawing as few or fewer blue collar workers from the residents of Kings County who were in the labor force is, once again, way beyond .00000029, or less than three in ten million. The probability five years in a row takes us once again out of our field of study and into astronomy.

TABLE 17

PERCENTAGE OF WHITE COLLAR WORKERS AND OF BLUE COLLAR WORKERS IN FIVE PANELS (EXCLUDING THOSE NOT IN THE LABOR FORCE) AND AMONG KINGS COUNTY RESIDENTS IN THE LABOR FORCE

	Qualification Sheet Data					Census Data
	1958	1959	1960	1961	1962	Residents of Kings County Who were in the Labor Force in 1960
White Collar	94.8%	96.2%	96.0%	95.5%	95.2%	45.3%
Blue Collar	2.9	2.2	1.9	2.7	2.7	47.6
No answer or not classifiable (qualification sheet): not reported (census)	2.4	1.6	2.1	1.8	2.1	6.9
Total	100.1% (718)	100% (738)	100% (854)	100% (801)	100% (985)	99.8% (1,046,724)

In part because income is associated with occupation, race, and age, the income distribution of the members of the panel is also quite different from the income distribution of Kings County as a whole.

Our mail questionnaire asked, "What was your total family income in 1966? (Salaries, interest, dividends, etc.)." In response to that question, a considerably smaller percentage of those who were interviewed by phone than of those who answered by mail said that they made $15,000 or more. And a considerably larger percentage of those who were interviewed by phone refused to answer. For people are more likely to reveal their income to an impersonal piece of paper that they mail to a university than to a stranger who calls them on the phone. And the wealthier people are least likely to reveal their income over the phone.

But the data of the mail questionnaire are quite consistent as regards the lower income brackets. The percentages who made less than $3,000, or between $3,000 and $4,999, are the same in the various sub-groups of responses. According to these data, slightly more than 3% of those who were on the grand jury panel between 1958 and 1962 made less than $3,000 in 1966. In Kings County in 1959, combining families whose heads were 35 years or older and unrelated individuals aged 35 years or older, 17.6% had an income of less than $3,000. But seven years separate 1959 and 1966. We must therefore consider how the income of those who were on the panel between 1958 and 1962 might have changed in the interim. Are they now making more money? Or less? Or about the same?

A certain percentage of those who were on the panel during the five years in question are making less money now than they made then, because they have retired in the meantime. But the data on year of birth suggest that they must be in a minority. For the large majority of people on the panels tend to be in their middle years, and would not have retired during the last six or eight years. What is more, most members of the panel do not have the kinds of jobs that make for declining income in middle age. Unskilled workers make less money in middle age than they had made when they were younger, but professional men make more. ~~But~~ Therefore, in order To correct for any possible ~~down~~upward trend in the income of most members of the panel since the period in question, we will ~~therefore~~ triple the percentage in the mail questionnaire and assume that 10% of those who were on the panel between 1958 and 1962 made less than $3,000 per year. The probability of drawing our questionnaire sample in which 10% of the people (or fewer) make less than $3,000 per year from a population in which 17.6% make less than $3,000 is less than .00000029, or less than three in ten million. Even if we assume that the correct percentage was not 3%, not 10%, but 12%, people in this income bracket are still less numerous than one could reasonably expect by chance. The probability of drawing a sample (size 716) in which 12% or fewer make less than $3,000 from the population aged 35 or more in Kings County in 1959 is less than .0000034, or less than thirty four in ten million.

The results for the group making less than $5,000 are quite similar. According to the mail questionnaire, 7.6% of those who were members of the grand jury panels between 1958 and 1962 had a family income of less than $5,000 in 1966. If we once again triple that percentage in order to guard against increases in income between the time period in question and 1966, and round up to 25%, people making less than $5,000 per year were still under-represented. In Kings County in 1959, 36.8% of the families and unrelated individuals aged 35 or older had an annual income ~~of~~ less than $5,000. The probability of drawing a sample (size 716) in which 25% or fewer make less than $5,000 annually from a population in which 36.8% make less than $5,000 is less than .00000029, or less than three in ten million.

There is one more indication of the underrepresentation of the poor on the grand jury panels. The qualification sheet asks each prospective juror, "Are you on relief?" Not one qualification sheet in our entire sample indicates that the member of the panel was on relief at the time he filled out his form. In New York City there are many different types of relief, including Old Age Assistance, Blind Assistance, Aid to Dependent Children, Aid to the Disabled, and others. Some of these types are for people who would not, or could not, belong to a grand jury panel -- children, the very old, and perhaps the blind or disabled. One type, Home Relief, is more relevant. It is given when an individual or family suffers a loss of income, or to supplement an inadequate income. That is, it is given to people who are normally in the labor force, and the reports of the Department of Welfare make it possible to separate out the number of adults who are on Home Relief. Combining the categories, adults in family cases and one person cases, (and estimating the number of children who were included in one person cases in 1961 and 1962), there was an average of 7,035 people on Home Relief in the months of December 1958 through 1962.[36] (We picked December as a month when unemployment is likely to be low.) The figures vary from a low of about 6,640 in 1961 to a high of 7,774 in 1958. The average of 7,035 persons is 0.4% of the adult population of Brooklyn aged 21 years or older.

Let us assume that the panels included not 0%, but 0.1% on relief during each of the five years in question. Using the average of 7,035 (and sample size 2,131), the probability of drawing a sample in which 0.1% or less are on relief from a population in which 0.4% are on relief is less than .030, or less than three in a hundred. The probability of drawing two such samples, independently, two times in a row in (.03 x .03), which is .0009, or nine times in ten thousand. And the probability five times in a row is, once again, astronomical. It works out to .0000000243, or less than three in one hundred million. By chance, there might well be some panels that include no one on relief. But if the panels were independent events, if there was not a built-in carryover of membership from year to year, then the consistent pattern over the years could not reasonably happen by chance, even though we have limited relief to Home Relief, a type that includes only a tiny fraction of the entire adult population.

In sum both the working class and the poor were underrepresented on the grand jury panels to an extent that one could not expect by chance in more than a small handful of panels over an astronomical number of years.

Educational Levels: As seen above in Table 3, about one-fourth of the members of the grand jury panel during each of the five years were college graduates, and less than 10% did not go beyond the eighth grade. These figures are, of course, quite different from the figures for the total adult population of Kings County. Excluding those who had less than 5 years of school, which increases the percentage of college graduates, only 6.7% of the population aged 25 years or older were college graduates in 1960, as against roughly 25% in each of the five panels.[37]

But the population with 5 or more years of school is probably not the appropriate population with which to compare the panels. Some minimum educational standards are required, although it may not be clear just what those standards are, in fact; or just what they should be. However, if we define the population of potential grand jurors to include only people who have at least a high school diploma, then the educational standard is higher than the standard which in fact was used during the five years in question.

For, according to the qualification sheet data in Table 3, above, over 20% of each of the five panels had less than a complete high school education. Or, using questionnaire data in which people tend to rank themselves upward (as opposed to our procedures for coding qualification sheets which tended to rank them downward in ambiguous cases) over 10% of the members of the panel during the years in question had less than a complete high school education.

If we use a standard that was higher than the standard which in fact was used, and still find an overrepresentation of college graduates as compared to the population of potential jurors, then we understate the true extent to which the highly educated people are overrepresented. That is the procedure we use.

Table 18 gives the percentages of Kings County residents in 1960, excluding those who had not graduated from high school, who were high school graduates; who had attended, but did not complete, college; and who completed college. As that table shows, the percentages for these different age groups-- 25 and over, 30 and over, and 35 and over -- are virtually identical. Therefore, our results will not vary with one's choice of a minimum age for membership on the panel. It makes no difference whether 25 is the minimum, or 30, or 35.

TABLE 18

EDUCATIONAL LEVELS OF THE KINGS COUNTY POPULATION IN 1960, EXCLUDING THOSE WHO WERE NOT HIGH SCHOOL GRADUATES

(Census Data)

	Age Groups		
	25 years or older	30 years or older	35 years or older
High school graduates	64.5%	64.9%	64.6%
Some college	17.9	17.5	17.9
Completed college or more	17.7	17.5	17.6
Total	100.1% (522,149)	99.9% (427,000)	100.1% (338,654)

Defining the population of potential jurors to include only high school graduates, slightly more than 17% of that population were college graduates in 1960, as against 25% in each of the panels between 1958 and 1962 (the qualification sheet data in Table 3 show a high of 25.9% and a low of 24.6%). Using the most conservative procedure (the lowest percentage of college graduates on the panel and the smallest sample size), the probability of drawing a sample in which such a high percentage, or higher, are college graduates from a population in which 17.5% are college graduates is less than .000036, or less than thirty six times in a million. If we defined the potential population to include those who had some high school, the probability would be even smaller.

The overrepresentation of the highly educated is compounded with the underrepresentation of Negroes. As seen below in Table 19, the only people in our qualification sheet sample who had only an eighth grade education, or less, were white. And the whites were more likely to have only a high school

TABLE 19

EDUCATION BY RACE OF MEMBERS OF THE GRAND JURY PANEL

(Qualification Sheet Data)

	Race	
Education	White	Negro
Eighth grade or less	6.6%	--
Some high school	19.0	7.4%
High school graduate	32.5	22.2
Some college	16.6	40.7
College graduate	20.6	18.5
College plus graduate work	4.0	3.7
No answer or not classifiable	0.3	7.4
Total	99.6% (2087)	99.9% (27)

diploma, or only some high school, than the Negroes. The majority of the Negroes, as against 40.2% of the whites, had attended college. We saw above the extent to which the Negro population as a whole is underrepresented on the grand jury panels. The less educated Negroes are underrepresented to an even greater degree.

Marital Status: The qualification sheets ask prospective jurors if they are married, single, or widowed; if they have ever been divorced; and if they have ever been separated. The United States census reports figures on the percentage of people who were divorced at the time of the enumeration, but does not report figures on the percentage of people who were ever divorced.[38] It does report data on people married more than once. But it is not possible from the published data to tell how many married more than once because they had been divorced, and how many married more than once because their first spouse had died. The comparable data on the qualification sheets, therefore, are the figures on people who indicated that they had been divorced but were single at the time they answered the question.

These data do not give us the exact percentages of people on the panels who were single but divorced during each of the five years in question. Some of those who were single but divorced when they filled out the qualification sheets presumably remarried before they went on the grand jury panel. And some of those who were married but never divorced presumably got divorces. We cannot keep track of these changes because the Revision Notices that are attached to the qualification sheets do not include information on marital status. But there is hardly any problem in this respect. For these changes mean that we understate the percentage of panelists who were ever divorced and, in any case, the information available to us is also the only information available on the record to officials who select members of the panels.

Of the 1,878 males for whom we have qualification sheets, 1,650 were ever married at the time they answered the question. Ever married males were 87.9% of the qualification sheet sample, as compared to 90.2% in the male population of Kings County aged 35 years or more in 1960. Of the ever married males, 1.3% had ever been divorced. Almost the same percentage, 1.2%, of the ever married males 35 years and over were divorced at the time of the 1960 census enumeration. But, of course, the percentage ever divorced in the population was greater than the percentage who were divorced at that one point in time.

The percentages of male members of the panels who were divorced at the time they filled out their qualification sheets are reported for each of the five panels in Table 20. The percentages vary from a low of 0.1% (in 1959) to a high of 0.7% (in 1958), as against a figure of 1.1% for all males aged 35 or over in Kings County in 1960. Taking the largest percentage of men who were divorced at the time they filled out the qualification sheet, 0.7% (in 1958), the probability of drawing a panel on which 0.7% of the males or fewer are divorced from a population in which 1.1% are divorced is slightly less than .2938, or roughly 29 times in a hundred. In other words, such a result could easily occur once, solely by chance. But if the five panels were independent samples of the population, the probability of such a low percentage five times in a row would be less than .0001076, or about once in ten thousand times.

The low percentage of divorced men in any one year out of five does not necessarily demonstrate any tendency to keep them out. But the consistent pattern over five years does suggest such a tendency. This conclusion is supported by the "explanations" or comments about their divorces that these

TABLE 20

PERCENTAGE OF ALL MALE MEMBERS OF THE GRAND JURY PANELS WHO WERE DIVORCED AT THE TIME THEY FILLED OUT THE QUALIFICATION SHEET

Year of Panel	
1958	0.7% (715)
1959	0.1% (728)
1960	0.4% (844)
1961	0.2% (785)
1962	0.4% (957)

men entered on the qualification sheets. In the upper right ~~hander~~ corner of the second page of the qualification sheets is a box headed, "Explanations of any answers on opposite side of this form, or remarks, may be made here." In that box people explain, for example, minor infractions of the law that they had noted in response to a question about "any trouble with the authorities," including "violation of a traffic ordinance or statute, or any other ordinance." All of the men who had ever been divorced or ever been separated commented about their divorce or separation in this space. Perhaps because the laws of New York allowed divorce only for adultery, the state in which the divorce took place was always noted, and the men always mentioned who the plaintiffs were, themselves or their wives. The existence of these comments, the fact that the percentage ever divorced is about the same as the percentage divorced in 1960, in the population aged 30 or older, and the consistent pattern as regards men who were single but divorced at the time they filled out the qualification sheet, suggest that there is a taint of disrepute hovering about divorces which keeps more divorced men off the panel than one would reasonably expect by chance.

CONCLUSION

The grand jury panels of Kings County during the years in question were quite unrepresentative of the eligible populations from which they were drawn. This study does not examine the processes which led to that result. But the use of statistical methods to assess the result suggests that we might think in terms of probability about selection procedures as well. Assuming the goal of grand jury panels that are representative cross-sections of citizens (excluding certain people such as felons or the functionally illiterate), sampling procedures that are common and well established in other fields might also apply to the selection of grand juries.

In the most straightforward, and quite unrealistic terms, one might draw jury panels by giving each eligible citizen a number, and drawing a random sample of 2,000 by picking 2,000 numbers from a table of random numbers. ("Random," here, does not mean "haphazard." It means that each member of the eligible population has an equal chance of becoming a member of the panel. "Random sample" means "probability sample.") Practically, however, you need some list to start from. Working from lists of registered voters introduces some bias at the very start, since people in lower income brackets are less likely to be registered than people in higher brackets. The phone book would be less biased, in New York City at least, if not in, say, rural Mississippi. And whenever random selection from phone books turned up an alien, or someone not eligible for other reasons, he would be eliminated.

But such a procedure is unnecessarily cumbersome. It is more practical to work from lists that do not include hundreds of thousands of people. And there are good statistical reasons for working with small lists, limited to residents of small areas.

One increases the chances of drawing a representative sample if the sample is stratified. That is, you first separate the total population into, say, whites and non-whites; then into income brackets and educational levels; then, perhaps into whites who are native born of native parents and those who are not. Assuming for simplicity that all the divisions are dichotomous -- simply high education versus less education, or higher income versus lower income-- one would then have 12 sub-groups: non-whites with high education and high income, non-whites with high education and low income, non-whites with less education and high income, non-whites with less education and low income; and the same four groups among whites, but each of them broken down further into those who are native born of native parents and those who are not. One can then ascertain from census data which percentage of the total population falls in each of these 12 categories, and sample randomly a number of people within each grouping which is proportional to that grouping's percentage in the total population. For example, if a panel is to have 2,000 members, and if non-whites with high education and low income are, say 8% of the total population, then one samples 160 people (8% of 2,000) who are non-whites with a high education and a low income. This example serves only to illustrate the general principle. The actual choice of criteria for stratifying a sample would be a legal question. Some possible criteria, such as race, are legally relevant. Other possible criteria, such as membership in voluntary associations or owning a house, may not be legally relevant.

Such a sample, a stratified random sample, can only be as good as or better (in the sense of more representative) than a random sample from a total list. It can never be worse. It guarantees representativeness at least with respect to the characteristics that were used to define the sub-groups. And it increases the chances of representativeness with respect to other characteristics -- such as religion or occupation -- that are statistically associated in the population with the characteristics that defined the sub-groups.

But this procedure, too, is impractical and undesirable. It would require government officials to maintain fairly detailed records on the personal characteristics of all eligible citizens. But it would be possible to approximate in practice the general principles of this type of sample.

In most large counties, small geographical areas vary widely from one another with respect to the combinations of characteristics of the people within them. One fairly small area might include, say, a large number of blue collar workers of Italian descent; another has many Negro blue collar workers; another is the spot where many Negro white collar workers live, and so forth. A random sample of small areas might leave out, say, the one spot where most working class Jews, or most Italians live. But repeated random samples, every year or every few years, would in time pick up all or most of the types of areas in a given city or county. And stratified random samples of areas would assure that different types of areas are included. After sampling areas, one would then select, from voter registration lists or from some other list, people within each area. First randomly select areas, and then randomly select people within each area.

The areas, however, must be small -- blocks or perhaps election districts, for example, not assembly districts. For the smaller the area, the greater the chances of coming up with a sample that is representative of the entire county. Suppose, for example, that 5% of the people in an assembly district are, say, second-generation Italian working class Catholics.

If people with this combination of characteristics are a very small percentage of the county's total population of people eligible for the grand jury, then no such person might be picked up at all, if all the samples are within large areas; while some, at least, are more likely to be drawn if the samples are taken within small areas. (See note, bottom of p.56.)

A stratified sample that requires detailed information on all eligible citizens is not possible. But it is possible to approximate the same result by stratified random samples of small areas, followed by non-stratified random samples of citizens within each area.

There are still other problems. Some groups in the population are more transient than others. Some kinds of people are less willing to serve on juries than others. Some groups might include a much higher proportion of ineligibles than others. These problems can be solved by oversampling. If it is known, say, that 6 out of 10 Negroes and 4 out of 10 whites seek to be excused from jury service, then one oversamples the Negro population such that, after the excused are eliminated, the remainder will be representative. If a representative panel should include roughly 200 Negroes and 1,800 whites, then, given the hypothetical rates of requests to be excused, the initial sample should include the following: about 500 Negroes, of whom 60% are excused, leaving about 200; and about 3,000 whites, of whom 40% are excused, leaving 1,800. If one first samples areas, and then people within areas, then there are certain additional complications as to how one goes about oversampling Negroes. But the principle is quite simple.

Turnover from year to year adds further complications. The simplest way to keep grand jury panels representative is to have fresh samples every year, or every few years. Fresh samples mean two things. The panel would change with changes in the social composition of a county. And panels would not become increasingly unrepresentative over time, even if the social composition of the county does not change, should it happen that some types of people are more likely than others to drop off the lists. If experience and continuity are desirable, they can be achieved by taking a fresh sample every year of some stipulated percentage of the panel, say a quarter or one third. The alternative is quite complicated. If one wants to drop nobody who does not drop off voluntarily, or for reasons of death or old age, then the sampling procedures required to keep the panel representative become quite cumbersome. Essentially, they boil down to random samples of newcomers, but with a sampling design that takes account of changes in the composition of the population and of different rates of leaving the panel (if any) by people with different social characteristics. The very cumbersome nature of such a sampling design might be a good administrative reason for fresh samples of entire panels, or of stipulated percentages of entire panels, every year or every few years.

It is most unlikely, even with the procedures that are outlined here, that most panels will ever be representative right on the nose. Probability theory says that randomly selected panels will deviate from exact representativeness some of the time, or in some respects. It also says that improbable things sometimes happen. And no doubt there will always be some practical or administrative limits that prevent perfect sampling design. But procedures such as these seem appropriate, even required, if the goal is representative grand juries. And the procedures themselves have built-in solutions to problems such as requests to be excused, transiency, or variations in the percentages of people within different social groups who are eligible for jury service. Granted the goal of a representative grand jury, the answer to these problems is more systematic sampling, not less.

Note: In a probability sample of 50 people from an assembly district in which 5% are second generation Italian working class Catholics, the chances of drawing only 1 second generation Italian working class Catholic, or none at all, are pretty good -- about 15 times in a hundred. If they are concentrated in one area within the assembly district, so that they form, say, 10% of an election district, then the chances of drawing only one, or none at all, are slightly smaller. They are then about 12 times in a hundred. But if the sampling takes place in a very small area, where they form 20% of the population, then the chances of drawing only one, ornone, in a sample of fifty are only one in a thousand.

APPENDIX A

THE MAIL SURVEY

This appendix explains the procedures of the mail survey, and presents data which justify the ways in which we have used the survey data in the bulk of this report.

A master list of all people who were members of the grand jury panel during one or more of the five years in question was compiled from the annual lists. There are 5,320 names on the master list. We have 2,131 qualification sheets, about 40% of the total. However, we found 47 qualification sheets whose names were not on the master list. This discrepancy could come about in various ways. There could have been errors in the original compilation of the annual lists. Or perhaps on a few occasions clerks neglected to add the name of a person who became a member of the panel after an annual list was compiled. There were probably a few errors in the compilation of the master list from the annual lists. And the total of 47 missing names may include a few which are in fact on the master list but which we overlooked in error when checking qualification sheets against the master list. In that case, the percentage of missing names, about 2%, would in fact be less than it appears. It is reasonable to assume that the percentage of missing names on the entire master list is about the same as the observed percentage of missing names among those for whom we have qualification sheets. We can therefore be confident that the master list from which we drew the sample for the mail survey included virtually all people who were members of the panels during the five years in question.

From our master list we drew a sample of 2,000 for the mail survey. We drew an initial sample of 400, for an initial mailing, in the following way. First, we assigned numbers to every person on the master list. Second, we picked a number by opening a book of random numbers, letting a pencil fall on a number, and including in the sample the person whose assigned number corresponded to the number chosen in this way. We then included every thirteenth person on the list (since 400 times 13 is 3,200, and picking every thirteenth person would therefore take us through almost all of the master list). We drew the rest of the sample, 1,600 persons, by choosing another number from a book of random numbers, including in the sample the person whose assigned number corresponded to the number thus chosen, and then including every third name, disregarding the 400 people who had been drawn in the initial sample.

After we drew the sample, we turned to Dr. Lloyd Kirban of the Market Research Corporation of America. We consulted with him and with his assistant, Miss Ann Breen, on the wording and format of the questionnaire. His organization handled the printing and mailing of the questionnaires; follow-up procedures; phone interviews with sub-samples of those whose questionnaires were returned because the addresses were outdated; and phone interviews with those who had not moved, but who did not respond by mail after a follow-up letter. His organization also handled some of the processing of the data.

Of the initial sample of 2,000, 343 questionnaires were returned before a follow-up letter. One hundred and forty four were returned after the follow-up letter, not counting 10 that arrived too late for inclusion in our tabulations. We have two additional groups of respondents, those whom we interviewed by telephone, because they had changed their addresses and their questionnaires were returned as not forwardable; and those whom we interviewed by phone because, although they had not changed their addresses, they did not respond to the follow-up letter.

We had to uee the addresses on the master lists. They had been taken from the annual lists. For that reason, the most recent addresses dated from 1962. Hence, about 600 of the 2,000 mail questionnaires were returned because the addressees had moved and their mail was no longer forwardable. At that point, we looked in the Brooklyn phone book for the names of 70 people whose questionnaires were returned as not forwardable. We found 28, or 40% of them in the Brooklyn phone book. We could not be sure, at that point, that all 40% were in fact members or former members of the grand jury panel, instead of different people with the same names. When we came to phone interviews we had to ask them on the phone if they had ever been a member of a jury panel. But it seemed, at that point, that if we could reach close to 40% of those whose questionnaires were returned as not forwardable in the Brooklyn phone book alone, then we ought to be able to reach a considerably higher percentage if we searched also in the phone books of Manhattan, Queens, and the Bronx, and of Nassau County, Suffolk County, and Westchester County. We therefore decided to conduct phone interviews with a sample of those whose questionnaires were returned as not forwardable.

Five interviewers were given the original envelopes of respondents who were no longer at the addresses on the master list. The interviewers were instructed to attempt to complete 50 interviews. They were instructed to search for the names of respondents on the envelopes in the following phone books: Brooklyn, Nassau, Suffolk, Queens, Bronx, Manhattan. The questionnaire was amended so that a question regarding jury duty was included, "Have you ever been on a jury panel?" Interviewers were instructed to terminate the interview if the respondent answered "no" to this question, and told continue looking up each name in the phone books. Each interviewer was given an average of 120 envelopes from which to complete her quota. A total of 129 interviews was obtained.

We did not ask specifically about membership on a grand jury panel, but only about a jury panel, for two reasons. First, all or virtually all members of the grand jury panel had a record of service on trial juries before they went on the grand jury panel. Therefore, if the answer to the question about a "jury panel" was "no," then we had the wrong man. Second, grand juries are very special institutions, and grand jurors are a very special group. For example, they have their own Association. We felt that if we reminded the respondents of their very special status, that fact might influence their answers unduly. For example, they might inflate their education. Or they might be more likely to object to some of our questions, such as the questions about income and religion. Inquiry into this very special institution might have seemed more objectionable. Similarly, the letter that accompanied the mail questionnaire read, "We understand that you have been on a jury panel," and did not specifically mention the grand jury panel.

We can tell from the telephone exchanges and area codes that interviewers recorded where most of the 129 people now live. But interviewers did not record the numbers for 22% of these 129 people. Assuming that those for whom we have no information are distributed among the various boroughs and counties similarly to those for whom we do have the information, about 55% of these 129 people still live in Brooklyn, very few in Manhattan or the Bronx, and most of those no longer in Brooklyn are now in Queens or in Nassau and Suffolk Counties. Of the total of 129 phone interviews with people who had moved, 39% (50) were with people who are still residents of

Kings County and are still on the panel or on the alternate list. In contrast, 53% of those who answered by mail before the follow-up letter are still on the panel or the alternate list. Therefore, when we present data on these different groups, below, we know that we are comparing one group in which the majority are still on one of the two lists and another in which the majority are on neither.

The fourth sub-group among the questionnaire respondents consists of those who did not move, but also did not respond to the follow-up letter. We gave to 5 interviewers the names and addresses of all those who were in this category. They were instructed to work down their lists until they had completed 20 interviews, with call-backs permitted if they were required to complete their quotas. In this way, 100 additional phone interviews were completed.

The various sub-groups of respondents add up to 716 completed questionnaires or phone interviews (not counting the 10 that arrived too late for inclusion and not counting a few questionnaires that were returned by people who should not have answered them, such as a few husbands who answered for their wives and a few people whose names were not on our list). These 716 people constitute 35.8% of the initial sample of 2,000. The 129 people who had moved and were interviewed by telephone are about 21% of all those who had moved. The 587 people who did not move and who either returned their questionnaires or were reached by phone are about 40% of those who did not move. Given this rate of response, it is necessary to show that non-response (whether because of new addresses, or lack of interest, or any other reason) is not related to the social characteristics that concern us in this study. It is necessary to prove that point, in order to conclude that the questionnaire responses which we use are representative of the total sample of 2,000, which in turn was a probability sample of the total population of panelists during the years in question. If those who did not answer but were reached on the phone differ considerably from those who did answer, then those who did not answer and were not reached by phone must also differ considerably from those who answered. If that were true, then we would not be justified in using the survey data for the purposes to which we have put them in this study.

Table A-1 shows that the four sub-groups are virtually identical with respect to the country in which the respondents were born. The only

TABLE A-1

COUNTRY OF BIRTH OF FOUR GROUPS OF SURVEY RESPONDENTS

Country of birth	Answered questionnaire before follow-up	Answered questionnaire after follow-up	Did not move, and were interviewed by telephone	Moved, and were interviewed by telephone
U.S.A.	86.5%	87.5%	96.0%	85.2%
Puerto Rico	--	--	--	--
Ireland	1.7	0.7	--	--
Italy	1.5	1.4	--	--
Germany	0.3	--	--	--
Scandinavia	0.6	0.7	--	0.8
Holland	--	--	--	0.8
British Isles	1.5	0.7	--	1.6
Eastern Europe*	3.8	6.9	2.0	7.0
Greece	--	--	--	--
Other Europe	--	0.7	--	--
Arab countries	--	--	--	--
Latin America	--	0.7	--	--
Other	2.0	0.7	2.0	0.8
N.A.	2.0	--	--	3.9
Total	99.9% (343)	100% (144)	100% (100)	100.1% (129)

*Eastern Europe includes Austria, Austria-Hungary, Hungary, Poland, Rumania, Czechoslovakia, Yugoslovakia, Russia, Latvia, Lithuania, Estonia, and Bulgaria.

exception, the percentage who were born in the United States in the third column of that table need not concern us. For if that exception implies that those who did not answer the questionnaire are more likely to be native-born than those who did, the only consequence would be that we understated the overrepresentation of the native-born, as seen above in Table 2(p.5). Table A-2 shows how close the four sub-groups are with respect to the countries in which the respondents' fathers were born. The data on the countries of their mothers' birth, not reported here, tell the same story.

TABLE A-2

COUNTRY OF FATHER'S BIRTH OF FOUR GROUPS OF SURVEY RESPONDENTS

Country of father's birth:	Answered questionnaire before follow-up	Answered questionnaire after follow-up	Did not move, and were interviewed by telephone	Moved, and were interviewed by telephone
U.S.A.	38.8%	35.4%	37.0%	36.4%
Puerto Rico	--	--	--	--
Ireland	5.3	6.3	5.0	11.6
Italy	9.9	10.4	8.0	5.4
Germany	4.9	7.6	6.0	2.3
Scandinavia	5.7	2.8	4.0	3.1
Holland	--	0.7	--	0.8
British Isles	3.8	4.2	3.0	0.8
Eastern Europe	27.9	30.6	33.0	30.2
Greece	0.3	--	--	0.8
Other Europe	1.2	1.4	1.0	0.8
Arab countries	0.6	--	--	--
Latin America	0.3	0.7	--	--
Other	0.9	0.7	2.0	1.6
N.A.	--	--	1.0	6.2
Total	99.3% (343)	100.8% ~~(135)~~ (144)	100% (100)	99.2% (129)

Table A-3 presents the data on the respondents' income or family income in 1966. As that table shows, a smaller percentage of those who were interviewed by phone report that they made $15,000 or more in 1966 than of those who answered by mail. But those who were interviewed by phone were also much more likely to refuse to state their income. For people are less likely to reveal their income on the phone than in a questionnaire, and the wealthier are less likely to reveal their income on the phone than the less wealthy. But there are no statistically significant differences between the four groups as regards the percentage who made less than $3,000 or less than $5,000 in 1966. That is, the differences in these percentages in Table A-3 are small enough to come about by random fluctuations more than five times in a hundred. Taking the percentages who made less than $5,000, the smallest probability is greater than .1260 and the largest is greater than .4964.

Similarly, most of the differences in the percentages making less than $10,000 can be attributed to random fluctuation. The only significant difference, the difference between the percentage among those who answered the mail questionnaire before the follow-up and those who did not move but were phoned, could come about by random fluctuation about three times in a hundred. The other five probabilities vary from about .18 to about .98. This finding suggests that the people who responded to the survey are somewhat wealthier than those who did not. However, there are no differences between those who responded and those who did not respond with respect to percentages in the lower income brackets. That is the reason why we used the lower cutting points in the discussion of income levels above (pp. 42 and 43).

TABLE A-3

FAMILY INCOME IN 1966 OF FOUR GROUPS OF SURVEY RESPONDENTS

Family Income in 1966	Answered questionnaire before follow-up	Answered questionnaire after follow-up	Did not move, and were interviewed by telephone	Moved, and were interviewed by telephone
Less than $3,000	3.5%	4.2%	1.0%	3.1%
$3,000- $4,999	3.8	4.9	9.0	1.6
$5,000- $9,999	22.4	23.6	31.0	27.9
$10,000 - $14,999	34.1	35.4	29.0	24.8
$15,000 or more	31.5	26.4	6.0	20.9
No answer	4.7	5.6	24.0	21.7
Total	100% (343)	100.1% (144)	100% (100)	100% (129)

Table A-4 presents the data on the respondents' religion. The percentages of Catholics hardly differs from one group to the next -- 37%, 35.4%, 37%, and 39.5%. The percentage of Jews is also stable -- 30%, 31.3%, 38%, and 33.3%. The largest percentage difference here, between 30% and 38%, could (give the sample sizes) come about by random error about 13 times in a hundred, if there is no real difference in the population. The percentages who identify themselves as Protestants are the only ones that vary considerably. The percentages in the first three columns are quite close -- 24.5%, 25.7%, and 22.0%. Among those who moved and were reached by phone the percentage drops down to 12.4%. Among those who answered and returned the questionnaire before the follow-up letter, the percentage of Protestants is 24.5%. If there is no real difference in the two populations from which the two samples come, a difference as great as the one observed could come about by random error (in samples of this size) only 4 times in a thousand.

However, among those who moved, and whom we reached by telephone, the percentage who refused to reveal their religion is greater than it is in any other group. One would guess, from examining Table A-4, that most of those who did not answer the question are Protestants. If that were the case, then the percentage of Protestants in the fourth column in Table A-4 would be almost identical to the percentage of Protestants in the first three columns. Perhaps Protestants who are not active in church are less sure of their religious identity than Catholics and Jews are, whether the Catholics and Jews are active religiously or not. If so, they might be less ready to identify themselves as Protestants in a phone interview than when given a check list of alternatives on a printed questionnaire. But that supposition could not explain the difference between those whom we phoned because they moved, and those whom we phoned because they did not respond to the follow-up.

TABLE A-4

RELIGION OF FOUR GROUPS OF SURVEY RESPONDENTS

Respondents' Religion	Answered questionnaire before follow-up	Answered questionnaire after follow-up	Did not move, and were interviewed by telephone	Moved, and were interviewed by telephone
Protestant	24.5%	25.7%	22.0%	12.4%
Catholic	37.0	35.4	37.0	39.5
Jewish	30.0	31.3	38.0	33.3
Other	0.6	1.4	2.0	2.3
None	4.7	6.3	0.0	1.6
No answer	3.2	0.0	1.0	10.9
TOTAL	100% (343)	100.1% (144)	100% (100)	100% (129)

As seen in Table A-5, however, the same thing happened when respondents were asked about their mothers' religion. In that table, the percentages whose mothers were Catholic and whose mothers were Jewish are quite close, all across the board. But the percentage whose mothers were Protestant remains stable only over the first three columns. Then, as with the respondents' own religion, it goes down among those who had moved. And, once again, the percentage of those who refused to answer goes up among those who moved. What is more, the percentages in Table A-5 are all virtually identical, as we would expect, to the corresponding percentages in Table A-4.

The fact that the same thing happened twice suggests very strongly that there was something about the phone interviews with those who moved -- perhaps some characteristic of some of the interviewers assigned to this group, which we cannot identify -- which caused about half the Protestants in this group to decline to reveal their religion. We would be justified, therefore, in assuming that most of those who declined, among those who moved, are Protestants; and that the true percentages, therefore, are quite close in all four groups.

More conservatively, however, let us assume that only one half of those who declined, among those who moved, were Protestant. In that case we would add 7 of the 14 people who declined to the 16 who said that they were Protestants, and arrive at 17.8% Protestant (23 out of 129). Given these sample sizes, if there is no difference in the populations from which the sample in the first column and the sample in the last column of Table A-4 are drawn, a percentage difference as great as the one observed could come about by random error between 15 and 16 times out of a hundred. In other words, even a conservative estimate of the number of Protestants among those who declined to reveal their religion gives results that can be explained by random error, as opposed to a genuine difference in the population. For this reason we conclude that there is virtually no real difference between the two groups. The percentage who are Protestants in the first three columns of Table A-4 is 24.4%. Since we conclude that the four sub-groups do not really differ, we used the figure, 24%, in assessing the overrepresentation of white Protestants on the grand jury panels (pp. 37-38).

TABLE A-5

RELIGION OF THE MOTHERS OF FOUR GROUPS OF SURVEY RESPONDENTS

Mothers' Religion	Answered questionnaire before follow-up	Answered questionnaire after follow-up	Did not move, and were interviewed by telephone	Moved, and were interviewed by telephone
Protestant	25.9%	25.7%	23.0%	13.2%
Catholic	37.9	38.2	35.0	40.3
Jewish	31.2	32.6	37.0	33.3
Other	1.5	1.4	2.0	1.6
None	0.6	1.4	0.0	0.8
No answer	2.9	0.6	3.0	10.9
Total	100% (343)	99.9% (144)	100% (100)	100.1% (129)

Thus far, we have grounds for concluding that the four groups of survey respondents do not come from populations that differ with respect to country of birth, parents' countries of birth, the percentage who made less than $3,000 or less than $5,000 in 1966, and religion. As concerns these characteristics, we can use the survey data to describe the total population of grand jurors during the five years in question. We can also use the data on the respondents' nativity to buttress the conclusion that the qualification-sheet sample is a representative sample of the people who served on the grand jury panels during the five years in question, as we did in Table 2, above.

The data on education also buttress the conclusion that our 2,131 qualification sheets are a representative sample. But the route to that conclusion is somewhat more complex. First, Table A-6 presents the percentages in the four groups of survey respondents who did not graduate from high school. The highest percentage difference between these groups, 16.9% among those who answered before the follow-up as against 9.3% among those who moved, could (given the two sample sizes) come about by random error about 51 times in a hundred. We can conclude that the four groups come from populations which do not differ with respect to the percentage of people who did not graduate from high school.

TABLE A-6

PERCENTAGE OF FOUR GROUPS OF SURVEY RESPONDENTS WHO DID NOT GRADUATE FROM HIGH SCHOOL

	Answered questionnaire before follow-up	Answered questionnaire after follow-up	Did not move, and were interviewed by telephone	Moved, and were interviewed by telephone
Did not graduate from high school	16.9% (343)	12.5% (144)	11.0% (100)	9.3% (129)

As regards the higher educational levels, however, there are some real differences between the various groups. The data are presented in Table A-7. Out of six possible comparisons of the percentages who graduated from high school but did not go further, three are statistically significant. That is, three of the six observed differences could not be expected by random error from populations in which the true percentages are identical. Those whom we reached by phone because they did not respond to the follow-up letter figure in two of the three comparisons that revealed statistically significant differences.

For example, if there is no difference in the percentage who graduated from high school and went no further between those who did not move and did not answer the questionnaire and those who answered the questionnaire before the follow-up letter, then the observed difference between the phone sample of those who did not move and did not answer (41%) and those who answered before the follow-up (22.2%) could occur by random error less than two times in ten thousand.

We saw above that those who did not answer have the same percentage as the other groups of people who made less than $5,000 or less than $3,000 in 1966; but that, above this cutting point, they are somewhat less wealthy. It is not surprising, then, that they also tend to be somewhat less educated, even though they are the same as the other three groups in the percentage having less than a complete high school education.

It is necessary, therefore, to estimate the percentage in the total population of grand jurors by weighting each group of survey respondents according to their percentage of the total sample of 2000 The roughly 600 who moved are about 30% of the total. In the phone sample of these people, 34% graduated from high school and went no further. The 487 who answered the questionnaire by mail are 24.4% of the total sample. Among them, 23.8% graduated from high school and went no further. The remainder, who did not

TABLE A-7

EDUCATIONAL LEVELS OF FOUR GROUPS OF SURVEY RESPONDENTS

Educational Levels	Answered questionnaire before follow-up	Answered questionnaire after follow-up	Did not move, and were interviewed by telephone	Moved, and were interviewed by telephone
1st to 7th grade	0.3%	0.0%	0.0%	0.8%
8th grade	5.5	2.8	7.0	5.4
9th to 11 grade	11.1	9.7	4.0	3.1
12th grade	22.2	27.8	41.0	34.1
College incomplete	26.5	36.8	24.0	22.5
College complete	21.0	9.7	16.0	20.2
Graduate work	12.0	12.5	5.0	9.3
No answer	1.4	0.6	3.0	4.6
Total	100% (343)	99.9% (144)	100% (100)	100% (129)

answer the questionnaire and did not move, are 45.6% of the entire sample. In the phone sample of these people, 41% graduated from high school and went no further. We estimate the percentage in the total sample of 2,000 (and in the total population of members of the panel) as follows: (34% of 30%) plus (23.8% of 24.4%) plus (41% of 45.6%). The result is 32.5% of the total (as opposed to the 28.1% reported above in Table 3, page 8, that you get by simply adding up all the responses and taking the percentage).

In the qualification sheet sample a virtually identical percentage, 32.7% (694 out of 2,131) graduated from high school and went no further. That is two-tenths of a percentage point off the estimate for the mail sample of 2,000. In the qualification sheet sample, the percentages for each of the five years vary from 29.8% (in 1961) to 34.7% (in 1962) and the average percentage over the five years is (like the percentage of the total) 32.5%.

Therefore, although the raw data from the mail survey differ from the qualification sheet sample, the data of the survey when properly weighted so as to take account of non-response, buttress the contention that the qualification sheet sample is a representative sample of the five grand jury panels in question with respect to education.

When we estimate the number of college graduates in the total sample of 2,000 by weighting each group of respondents appropriately, as we did above in order to estimate the percentage who graduated from high school and went no further, the result is 25.8%* (including those who also had graduate work). In the total qualification sheet sample the percentage is quite close, 24.9%. The percentages from year to year, reported in Table 3, page 8, vary from 24.6% (in 1958 and in 1962) to 25.9% (in 1961). The average percentage over the five years is 25.2%. With respect to the percentage of college graduates, too, the data of the survey, when the various groups of respondents are appropriately weighted, buttress the conclusion that the qualification sheet sample is a representative sample of the grand jury panels during the years in question. We were therefore justified in using the data from the qualification sheets (pp. 47-48) in order to estimate the extent to which, even if the population of eligible people is limited to high school graduates, the highly educated were overrepresented on the grand jury panels.

---

*This estimate weights all four groups separately. The estimate for high school graduates lumped all who answered by mail as one group.

The data of the mail survey support in still another way the conclusion that the qualification sheet sample is representative of the total panels during the five years in question. The question of representativeness boils down to the question, Are the social characteristics that concern this study associated with dropping off the panel between 1962 and 1967? We have answered that question in the negative by using a variety of methods. We can answer in still one more way. The respondents in the survey include some who are still on the panel or the alternate list, and some who are not. We can separate out those who have dropped off (whether they have moved out of Kings County or not), and see if they differ from the total response. In the total survey response, 3.2% made less than $3,000 in 1966. Combining those who moved and those who answered the questionnaire before the follow-up, 3.3% of those who are no longer on the panel made less than $3,000 in 1966. The corresponding percentages for those who made less than $5,000 are 7.5% and 7.9%. In the total survey response, 32.7% are Jewish, as against 30.5% of those who dropped off the panel (in the two groups, answered before follow-up and phoned because they had moved). The corresponding percentages of those who graduated from college are 28.5% and 33.5%, and for those who also had graduate work they are 10.6% and 11.7%. These survey data give still further evidence, if more were needed, that the qualification sheet sample is a representative sample in the respects that concernthis study.

APPENDIX B

TURNOVER AND SOCIAL CHARACTERISTICS

In the section on Data and Methods we reported that people who left the panel after 1962 do not significantly differ in the respects that concern this study from those who remained on, and that the qualification-sheet sample is therefore a representative sample of the total population of panelists during the five years in question. We had a number of different bases for that conclusion. One of them was the fact that, among those for whom we have qualification sheets, various social characteristics were not related to dropping off the panel during the five years in question. If that is so, and if there has been no major change in the operation of the grand jury system between 1962 and 1967, then one can make the inference that turnover since 1962 is also unrelated to the various characteristics that concern us. One can especially make that inference when, as in this case, the conclusion that our qualification-sheet sample is representative is buttressed also by other data, from fingerprint cards and from the mail questionnaire.

Some of the details on the relation (or absence of relation) between social characteristics of panelists and their retention on the panel, as seen in the qualification sheets, were given above, in the section on Data and Methods. This Appendix adds details regarding occupational groupings.

Among those who were members of the panel in 1958 (and for whom we have qualification sheets) 42.5% of the 200 who remained on the panel in 1959 were "Managers, Proprietors, and Officials," as against 38.4% of the 565 people who were on the panel in 1958 but were not on the panel in 1959. Among those who were on the panel in 1958 and remained on the panel in 1959, 32.5% were classified as "Clerical and Sales," as against 31.7% of those who were on in 1959 but did not remain on in 1959.

Among those who were on in 1958, 40.3% of the 442 who were also on in 1962 were "Proprietors, Managers, and Officials," as against 38.4% of the 323 who were on the panel in 1958 but were not on the panel in 1962. The corresponding percentages for "Clerical and Sales" were 31.0% and 33.1%. When one looks at the percentages who were Negro, and at the percentages who were blue collar workers, they remain uniformly low. The percentages are so low in any one year, that it is impossible for the percentages among those who do, and among those who do not remain on the panel in a subsequent year, to differ more than fractionally.

The data on occupational groupings with respect to entry into the panels during the years in question -- as opposed to retention or dropping off from one year to a subsequent year -- are somewhat less clear cut. For example, among those who were not on the panel in 1958 but were on the panel in 1959, 37.5% (of 582) were "Clerical and Sales" as against 32.5% (of 200) who were on in both years. Between 1958 and 1962, the results are similar -- 39.2% (of 646) were "Clerical and Sales" among those who were on the panel in 1962 but not in 1958, as compared to 31.0% (of 442) among those who were on in both years. These data suggest the possibility that occupational types were not related to dropping off the panel during the period in question, once a man was on; but that there may have been some tendency to recruit a higher percentage of people from the "Clerical and Sales" category, and a lower percentage from the more high-ranking white collar occupations. Such a tendency would not change our finding that all blue collar workers were underrepresented. Nor would such a tendency weaken our findings in any other respect. For if it is true that there was a higher percentage of "Clerical and Sales" among the newcomers in this period than among the holdovers, then we would expect that our qualification sheet sample contains a somewhat higher percentage of people in this occupational category than there should be. For those who were newcomers during the five years in question are more likely still to be on the panel or the alternate list than those who were not newcomers, because the newcomers were likely to be younger, and are less likely to have left the panel since 1962 for reasons of death or old age. Therefore, the likely result of any tendency during the period in question to recruit a higher percentage of "Clerical and Sales" than were found among the holdovers would be to increase the percentage of this group in our sample, and to understate the extent to which the higher ranking white collar occupations are overrepresented, by comparison with the residents of Brooklyn who are in the labor force.

NOTES

1. The question about color was taken off in 1956. See pp. 27-28, and Tables 13 and 14 for data on the percentage of qualification sheets in our sample that included this question.

2. The members of the qualification sheet sample are classified, in Table 1, according to the designation of race on the fingerprint cards, except for a very small number for whom fingerprint cards were not available. In those cases we classified them by race according to their answers to the question, "Color," on the qualification sheets, whenever that question was present.

3. Because of minor clerical errors in the offices of court clerks, or in our compilation of the master list from the five annual lists, our master list included about 99% of all persons who served on the panel during the years in question instead of 100%. We have qualification sheets for 47 people whom we did not locate on the master list of over 5,300 persons. Appendix A gives further details.

4. On four hundred and thirty seven qualification sheets, 20.5% of the total, non-academic special studies of one sort or another are reported.

5. Appendix A gives details on where those who moved were located. More than half were located in Brooklyn. Very few had moved to Manhattan or the Bronx.

6. Table 5 excludes people who were not on the panel until 1961 because they were not on long enough, prior to the end of our time period in 1962, to illustrate the frequency of the pattern of alternating years. Most of them would not be on again until 1963, and we have no data on that year.

7. Calculated from United States Census of Population: 1960, New York, Detailed Characteristics, Table 96. The census reports age groups in five-year categories. We estimated the number within the group, 20-24 years, who are 21-24 years by using a technique which is standard among demographers, Sprague multipliers. All references below to the U.S. Census will simply cite the table numbers. Among census tables cited, those numbered 94, or higher, are in the Detailed Characteristics volume for New York State. Those numbered 93 or lower are in the volume whose sub-title is General Social and Economic Characteristics.

8. Census, Table 103.

9. Peter Rossi, Why Families Move, The Free Press; Glencoe, Illinois, 1955. See, for example, Table 5.5, p. 73. This study, conducted in Philadelphia, is based on probability samples of dwelling units within different types of areas.

10. James A. Davis, in Great Books and Small Groups, The Free Press; Glencoe, 1961, presents data which show that, compared with the age distribution of all people in the U.S. who have attended college, members of the Great Books discussion clubs are disproportionately young.

11. Bernard Berelson, Paul F. Lazarsfeld, and William McPhee, Voting: A Study of Opinion Formation in a Presidential Campaign, The University of Chicago Press; Chicago, 1954, pp. 96-97. See Chart XLII, p. 97. This study was conducted in Elmira, N.Y., during the 1948 election campaign.

12. Ibid., Chart XLVIII, p. 105.

13. Ibid., Chart XXVIII, p. 70, which shows that younger voters in 1948 were less likely than older voters to follow the lead of their religious group. Younger Protestants were more likely than older Protestants to be Democrats. Younger Catholics were more likely than older Catholics to be Republican. Chart XXII, p. 60, shows that younger voters were more inclined than older voters to have party preferences that followed class lines. See also note 4, p. 59 on this point. Chart XXXVII, p. 89, shows that younger voters whose family background was Democratic were more likely, in this predominantly Republican community, to be Democratic than the older voters whose background was Democratic. Younger voters in the minority party still kept to their traditional party affiliation more than older voters, some of whom over time had defected to the majority.

14. Samuel A. Stouffer, Communism, Conformity and Civil Liberties: A Cross-Section of the Nation Speaks Its Mind, Peter Smith, Gloucester, Mass., 1963, Chapter 4, entitled, "How Tolerant Is the New Generation." First published in 1955. This study is based on a national sample.

15. Census, Table 96.

16. Census, Table 96.

17. New York City Department of Health, Population Characteristics, 1964, Report P-1 of the Population Health Survey, New York City, April, 1966, Table I, p. 16. These data are based on interviews with about 5,000 households out of a probability sample of about 5,700 households.

18. This probability is based on the formula $\frac{p_1 - p_2}{\sqrt{\frac{p_2(1-p_2)}{N_1}}}$, in which p_1 equals the percentage of Negroes in the panel, p_2 equals the percentage of Negroes aged 30 years or more in the population, and N_1 equals the size of the grand jury panel. This is a formula for giving the number of standard deviation units from the mean, in a normal distribution, when comparing a single sample (in this case the grand jury panel) with an infinite population. The probability of an observed percentage in a sample is then calculated by reading a table giving the proportion of area under the normal curve lying more than specified numbers of standard deviation units from the mean. Such tables are found in all standard statistics textbooks. In this case we consulted Margaret Hagood and Daniel O. Price, Statistics for Sociologists, Henry Holt and Company: New York, 1952, Table c, p. 559 and divided the probability values in

that table by one half in order to make a "one-tailed" test. In using the formula for the number of standard deviation uniys we do not use the actual size of the total panel, but the size of our qualification-sheet sample, unless as with the race, we have data on the entire panel. Using the sample size instead of the panel size is more conservative because it reduces the size of the denominator in the formula given above, therefore reduces the magnitude of the resulting number of standard deviation units, and therefore increases the probability of the observed percentage of Negroes on the panel. In two-by-two tables, in which the distribution of a bi-valued variable in a sample is compared with its distribution in a population, this formula is the equivalent of the chi square technique illustrated in Michael O. Finkelstein, "The Application of Statistical Decision Theory To The Jury Discrimination Cases," 80 Harvard Law Review, December, 1962, 338-376. Note that the formula used to calculate probabilities in Appendix A is different from this formula, since the questions in Appendix A involve comparisons between samples (that is, various groups of respondents to the mail survey), rather than the difference between a sample and a population in which a given characteristic is known.

19. Table P-15, 1960 Census, Population and Housing Survey: Summary Tables for All Boroughs, Prepared From Census Bureau Tape, City Planning Commission, New York, December 18, 1962.

20. Data provided by the City Planning Commission.

21. Thirty eight thousand, seven hundred and thirty is 75% of the 51,641 adults, thirty years old or older, who were born in Puerto Rico.

22. This calculation uses the smallest total in Table 2, above, the total for 1958, since that is the most conservative choice. The smaller the total, the greater the chances that the observed result could come about by random selection.

23. The probabilities in the case of Negroes are much smaller than the probabilities for Puerto Ricans because we have data on the total panels for Negro, but in calculating the probabilities for Puerto Ricans we use as the sample size the smallest qualification-sheet sample. This conservative procedure reduces the likelihood of error but also understates the true extent of deviance from distribution that might be expected by chance.

24. We consulted Aliens in the United States, G.P.O., 1965, which presents these tabulations, and also have the data for Kings County from the Immigration and Naturalization Service.

25. Data provided by the City Planning Commission of New York. Corresponds to Table 97, broken down by county.

26. Erroneously appears as 25 in text. Data provided by the City Planning Commission.

27. The exact percentage in the returns is 7.9%, with information lacking from 12 out of 716 questionnaires.

28. Sample size is 716.

29. The exact percentage is 32.7%, 234 out of 716 questionnaires, including 28 persons who did not answer. Appendix A gives further details on the basis for using this percentage.

30. Walter Laidlaw, editor and compiler, Cities Census Committee, 1932.

31. See, for example, "A Religious Census Report, Willowbrook-Castleton Corners, Staten Island. New York," November, 1963. See Also, "Lefrak City: A Religious Census," October, 1965. Both prepared by the Department of Church Planning and Research of the Protestant Council of the City of New York.

32. "Brooklyn: A Report and Working Document," New York Synod of the Lutheran Church In America, Mimeographed, January, 1964, Table VIII, P. A16.

33. Religious Distribution, III, Department of Church Planning and Research, Protestant Council of the City of New York, Mimeographed, September, 1961, Table III, p. 4.

34. See Appendix A for the bases for using this figure.

35. Because of the difficulties involved in classifying occupations, one of the students who worked on this study, Mr. Michael Tempel, became something of a specialist in this task, and worked with the author on it. The other coders did not classify occupations. The Census data in Table 16 are provided by the City Planning Commission. They correspond to Census, Table 123, broken down by county.

36. City of New York, Department of Welfare, Monthly Statistical Report, 19:12 (December, 1958), p. 12, and 20:12 (December, 1959, p. 12, and 21:12 (December, 1960, p. 11), and 22:12 (December, 1961), p. 12, and 23:12 (December, 1962), p. 12.

37. Census, Table 103.

38. Census, Table 105.

April 19, 1966

Asher B. Lans, Esq.
360 Lexington Avenue
New York, New York

Dear Asher:

Thank you for the copy of your complaint in Straus v. Hanley. Without a doubt I can say we are interested in joining you in this law suit to improve the jury system in New York and hopefully to eliminate much of the discrimination. What would joining the suit entail? Work we are willing to give; money may be another matter. Please let me hear from you.

Sincerely,

Carl Rachlin
General Counsel

CR:tp

cc: Marvin Rich

[enclosed, Appel to Nagler, 1966, May 8]

From: Brian E. Appel, Temple University Chapter,
Law Students Civil Rights Research Council

To: Steve Nagler, Esq.
Asst. General Counsel, C.O.R.E.
38 Park Row, New York, N.Y.

PROBLEM: What is the method by which grand jurors are selected in the Northern States? e.g. New York, Pennsylvania, California, Maryland, Michigan, and Massachusetts. In the large urban centers in these states, what percentage of the grand jurors are Negro and/or Puerto Rican?

A. The qualifications of grand jurors and methods of selection in the various states are outlined in the enclosed summary. In short, grand jurors are selected by lot from jury lists, and jury commissioners have wide discretion to screen out potential jurors.

A summary of the selection process in each jurisdiction is found in Vol. 2, American Criminal Law Quarterly, p. 119: "Grand Jury, Past and Present: a Survey," by John Spain (1963-64).

B. Our research facilities were not so broad as to include the percentages of grand jurors by race. Since most jury records in the North prohibit designation by race, such statistics are not readily accessible.

C. The following cases indicate the theories upon which recent attempts to challenge the methods of jury selection have been founded.

United States v. Foster, D.C.S.D.N.Y. (1949) 83 F. Supp. 197: Jury list was not required to have proportional representation of Negroes, Puerto Ricans, manual laborers, poor people, and members of various social and religious groups.

United States v. Kenner, (1965) 36 FRD 391: Use of voter lists as principal source of grand jurors was not improper.

United States v. Van Allen, D.C.S.D.N.Y. (1962), 208 F. Supp. 331: All that is required with respect to the source from which a grand jury is selected is that the source be reasonably designed to produce a fair cross-section of the community, with no systematic exclusion of any race, creed social or economic group.

United States v. Greenberg, D.C.S.D.N.Y. (1961), 200 F. Supp. 382: System of proportional representation not proper method for obtaining jury panel.

People v. Aaron (1961), 218 N.Y.S. 2d 625: To show denial of constitutional right to be indicted and tried by juries from which certain racial groups were not illegally and improperly excluded, defendants were compelled (and here failed) to show systematic and intentional exclusion of persons of Puerto Rican ancestry from grand jury and petit jury panels.

MAY 10 1966

1715 North Broad Street
Philadelphia, Pa. 19122
May 8, 1966

Dear Mr. Nagler,

I wish to apologize for delaying this material so very long. The fault is exclusively mine, for all of the students in our chapter completed their assignments promptly. But as the problem is of a general nature, perhaps the material will still be of use to you.

Sincerely,

Brian E. Appel, Cochairman

Brian E. Appel
Temple University Chapter
Law Students Civil Rights Research
Council

FROM: NATHAN STRAUS
1108 Wheeler Avenue
Bronx, New York 10472

6/10/66

FOR P.M. RELEASE, JUNE 13t

CONTACT: Alan Eisen
887-1700

CORE SUPPORTS NATHAN STRAUS JURY SUIT

Floyd B. McKissick, National Director of CORE, today announced that CORE is intervening in support of the lawsuit instituted by civic leader Nathan Straus to challenge the Constitutionality of provisions of the New York State Judiciary Law which have deprived minority groups of adequate representation on Grand Juries in the State.

On April 6th, Nathan Straus instituted this suit in the Bronx because of the "antiquated and totally unfair provisions of the Grand Jury section of the Judiciary Law, and the methods of interpretation used by the Clerk of the Court."

Since then, the State of New York has seen fit to intervene on the side of the State Constitution. Commenting on this action Mr. Straus stated that "I am shocked that the Governor has permitted the State's legal officers to take a position which appears to support one of the basic inequalities, so like a poll tax, still found in American life."

Mr. Straus concluded by saying that "I am both proud and pleased to welcome CORE into this fight. I am sure that we will be successful in erasing from the Constitution another of the blocks which prevent members of minority groups from exercising fully their Constitutional rights."

# # # # # # # # # # # # #

Straus
v
Hanly

June 20, 1966

Mr. Asher Lans, Esquire
360 Lexington Avenue
New York, New York

Dear Asher:

I have just received the motion papers to intervene in Straus v. Hanley.

I notice that they are on your back. Am I right in thinking that this is the height of indiscretion?

I enclose herewith a copy of letter sent to J. Lee Rankin that speaks for itself.

Best regards,

Carl Rachlin

General Counsel

CR/vh

Straus
v
Hanly

June 20, 1966

Honorable J. Lee Rankin
Corporation Council of
the City of New York
Municipal Building
New York, New York

Dear Sir:

There is pending in the Supreme Court of the State of New York, County of the Bronx an action entitled Nathan Straus, Plaintiff, v. John J. Hanley, County Clerk of Bronx County, and Mario A. Procaccino, Comptroller of the City of New York.

This case concerns discrimination particularly against Negroes in grand and pettit juries. As you can well understand, we have an interest in this matter and would like your permission and consent to intervene in that proceeding.

Thank you for your courtesy.

Sincerely yours,

Carl Rachlin
General Counsel

CR/vh

JUL 5 1966

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020

CABLE: SIMASH

July 1, 1966

Carl Rachlin, Esq.
CORE
38 Park Row
New York, N.Y.

Re: Straus v. Hanley

Dear Mr. Rachlin:

I enclose herewith a copy of a stipulation, the original of which we have forwarded to the Corporation Counsel's office for signature.

I was unable to reach you on Friday, but I assume that you would have no objection to adjourning both motions until September, which will give us adequate time to research and will permit both of us to submit briefs on the question of standing.

I have informed the Corporation Counsel's office that the agreed adjournment is, of course, subject to your approval.

Sincerely yours,

STEPHEN J. FEINBERG

SJF:VW
Enc.

Straus
v
Hanley

July 5, 1966

Stephen J. Feinberg, Esq.
Lans & Fink, Esqs.
360 Lexington Avenue
New York, New York

Dear Mr. Feinberg:

I enclose the signed copies of the stipulation extending time to 13th of September, 1966.

Sincerely,

Carl Rachlin
General Counsel

CR/tp
Encl.

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020
CABLE: SIMASH

Shaus v Hanley

August 29, 1966

Mr. Carl Rachlin
Student Defense Education Fund
150 Nassau Street
New York, New York

Dear Mr. Rachlin:

Pursuant to our conversation of this morning, I am sending you a copy of Judge Fuld's dissenting opinion in St. Clair v. Yonkers Raceway, 13 N.Y. 2d 72, 242 N.Y.S. 2d 43 (1963).

As you had suspected, the New York rule denying standing to state taxpayers to attack the constitutionality of state statutes is judicial in origin.

I will research the history of the rule and review the authorities in Fuld's dissent. I believe we may attack the rule on two grounds. First, the rule is unreasonable, discriminatory and unconstitutional in itself, as Fuld's opinion demonstrates. Second, the rule as applied to our situation immunizes the grand jury statute and procedure from attack by anyone. This result is inconsistent with the theory that there must be a remedy for a right, especially when a constitutional right is involved.

We are going to request the NAACP to intervene. I will mail a copy of the complaint to Mr. Carter this afternoon.

When I complete some additional research concerning the taxpayer rule and my Article 78 - mandamus idea, I will call and arrange for a meeting up here.

Sincerely,

Shephard Melzer

Shepard Melzer

SM:h
enc: copy of
judicial opinion

Shaus
v
Hanley

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020

CABLE: SIMASH

August 30, 1966

Mr. Carl Rachlin
Student Defense Education Fund
150 Nassau Street
New York, New York

Dear Mr. Rachlin:

I trust you have already received my letter of the 29th and the opinion enclosed therein.

Mr. Lans hopes to attack the taxpayer procedure in two ways. First, that the statute or rule which requires a taxpayer to have $1000 in property to bring a suit is unconstitutional because property is no more a constitutional prerequisite for suing than it is for voting (poll tax cases). Second, even if the taxpayer's suit with its present requirements is constitutional, the judicial rule which does not allow state taxpayers to attack constitutionality of state statutes is unconstitutional in general and as applied to our situation.

I hope we will be able to meet up here before the end of next week.

Sincerely yours,

Shephard Melzer

Shephard Melzer

SM:h

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020

CABLE: SIMASH

September 9, 1966

Mr. Carl Rachlin
Student Defense Education Fund
150 Nassau Street
New York, New York

RE: Straus v. Hanley

Dear Mr. Rachlin:

I enclose herewith a copy of the Notice of Motion to Intervene and the Affidavit of Amalia Betanzos, the President of the National Association for Puerto Rican Civil Rights. This group, like CORE, hopes to intervene in the proceeding. The Corporation Counsel is opposing both the intervention of CORE and the intervention of the Puerto Rican organization on the grounds that plaintiff lacks the legal capacity to sue and the introduction of those two parties will not correct the deficiency since they too lack standing.

As Mr. Feinberg told you yesterday, we believe we now have an individual who is personally aggrieved and who will therefore certainly have standing. We feel that this should overcome the City's procedural objections if our other arguments do not.

As you know, the matter has been adjourned until Tuesday, September 27th, on which date all these applications and motions will be heard.

Yesterday, I spoke to Robert Carter of the NAACP. He told me that the NAACP would not be able to intervene because of other pressing commitments and that he does not wish to sign any more briefs.

We will keep you informed of any further developments.

Sincerely yours,

LANS & FINK

Shephard Melzer

By: SHEPHARD MELZER

SM:MAS
Enc.

September 19, 1966

Basil R. Pollitt, Esq.
52 Sidney Place
Brooklyn, New York 11201

Dear Basil:

I have gone over your brief in Chestnut v. City of New York and
enjoyed reading it very much. The distinction you make between "is
denied" and "cannot enforce" is very interesting and I hope that you
can make it stick. Obviously, it is terribly important. In any event,
the New York statute certainly raises questions which appear to violate
the United States Constitution on its face and are not merely anticipa-
tory but indicate a statutory requirement under all circumstances.
While the statistical analysis you refer to on page 4, 5 and 6 of your
brief is terribly important and indicates the result of the discrimi-
natory statute. I am not certain how far they go if the issue is
whether the statutes violate the United States Constitution on its face.
Hopefully, the Court will give further analysis as you indicate on page
18 of your brief to the phrase "is primarily...a denial...resulting from
the Constitution or laws of the state... ." and less to the use of the
word "exclusively" as referred to in Virginia v. Rives and underscored
by Stewart in Rachel.

I look forward to seeing you soon. With warm regards.

Sincerely,

Carl Rachlin
General Counsel

CR:tp

October 4, 1966

Asher B. Lans, Esq.
360 Lexington Avenue
New York, New York

Dear Asher:

Basil R. Pollitt, an attorney with whom we have been associated for several years, has worked on a brief in a case entitled *Chestnut* v. *People of the State of New York* which is being argued in the Second Circuit Court of Appeals. Some of thepoints raised overlap with *Strauss* v. *Hanley*. Pollitt has asked us to prepare an amicus brief in his case. After you have had a chance to read his brief a copy of which I enclose, why don't you and I talk it over and make a decision. It'll give us a good excuse to get together anyway.

With warm personal regards.

Sincerely,

Carl Rachlin
General Counsel

CR:tp
Encl.

file Shaws
Hanley

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020

CABLE: SIMASH

October 6, 1966

Carl Rachlin, Esq.
S.E.D.F.
150 Nassau Street
New York, New York

Dear Carl:

Thank you for sending me a copy of the Brief in Chestnut v. New York, which I will read in the next few days and then be back to you.

Incidentally, one of the Assistant Attorney Generals of New York has just suggested that we should consider the possibility, for work after election day, of devising joint proposals with the Attorney General for amendments to the Judiciary Law. We will have to talk about this too when I get back.

Sincerely,

Asher

AL:PSG

October 12, 1966

Asher B. Lans, Esq.
Lans & Fink
360 Lexington Avenue
New York, N. Y. 10017

RE: Straus v. Henley

Dear Asher:

I have your letter of the 6th and it is obvious we should get together reasonably soon.

There was a decision from the Fifth Circuit Court of Appeals recently in New Orleans on the case of one Labat. Here the Fifth Circuit struck down a jury selection practice in Louisiana whereby working people were not required to submit to Jury Service. This eliminated, as a matter of fact, a large number of Negroes and was struck down for this reason.

This case I hope will be helpful to that part of our case which relates to the actual practice of the Court as distinct from the statute.

It certainly would be a good idea to propose a constitutional amendment to the Judiciary Law eliminating property as a qualification for service and also personal methods of selecting grand and petit jurors must be eliminated.

The system we are most in support of must be based on a random sample of jurors and not the one presently in use - a variation of the country club method of selection.

Let's get together for lunch and dinner soon and go over these matters.

Cordially,

CARL RACHLIN
General Counsel

CR/art

Straus
v
Hanley

Asher Laws

360 Lexington
OX 7-0020

October 25, 1966

The Louis M. Rabinowitz Foundation, Inc.
30 East 42nd Street
New York, N. Y. 10017

Dear Sirs:

After consultation with Basil Pollitt Esq. and other interested persons some months ago, I drafted a proposal for a study of the grand jury panel in Manhattan. The study would be a sample survey, and would indicate the class and ethnic composition of the panel, and certain other facts relevant to the litigation in which Mr. Pollitt is involved. It would also be tailored, in consultation with Mr. Pollitt and with other lawyers, to meet so far as possible the legal problems that the use of data from sample surveys has run up against in many courts. The proposal was submitted to the Projects Committee and to the Directorial Committee of the Bureau of Applied Social Research. Both groups acted favorably. That is to say, we are authorized to proceed with the project as an official BASR study, using the BASR name, facilities and staff. This letter is to request funds in support of the grand jury survey from the Rabinowitz Foundation.

The study would consist of interviews with a probability sample of several hundred members of the grand jury panel. Interviews, instead of mail questionnaires seem to be required for several reasons. For example, only with interviews will it be possible to bring the rate of response close to 100%. And we must have a high rate of response to be able to counter any objections to our results based on a hypothesis of self-selection in response.

Each interview will be quite brief, and will consist of questions on the respondent's religion, occupation (or spouse's occupation), income, perhaps languages spoken in the home, and similar, related matters. We will also ask a few questions relating to the operation of the panel -- how long respondent has been on the panel, how he got on in the first place, perhaps whether he has any friends on the panel, and the like.

Our report would consist essentially of a comparison between our results and, where applicable, census data for Manhattan. To judge solely on the basis of probability theory, a sample of a few hundred out of the 2,000 members of the panel would be quite sufficient, and a sample that is twice as large would not at all be twice as good. However, it will presumably be difficult to explain probability theory to a court. It will be advisable, therefore, to have a larger sample than is really necessary from a statistical point of view. Hence, expenses are higher than they would otherwise be. The enclosed budget is written for a sample of 1,000. We could probably bring that number down to, say, six hundred. In that case, the costs of interviewing and of coding would come down proportionately. Certain other costs would also come down, but less than proportionately to the decrease in the number of interviews.

You will also find enclosed a copy of a paper on the use of survey data as evidence in court. This paper was prepared at the Bureau specifically for this project by a sociology student who has a degree in law, and who is interested in working on the grand jury study.

I would be generally responsible for the project as "Principal Investigator." Whether or not I would also be "Study Director," that is, actually handle the day-to-day operations of the study, would depend on the situation of our staff at the time we begin work. That, in turn, depends on the availability of money. If I am not available at the time we go into the field, but other experienced study directors are, than some other person would handle the daily operations and I would be an unpaid Principal Investigator.

I have been associated with the Columbia Law School, am co-author of a report to the Advisory Committee on the Federal Rules of Civil Procedure, and am currently completing a book on civil litigation which is based on survey data from interviews with opposing lawyers in samples of suits terminated before the Federal district courts. Additional biographical information, including a list of publications, is enclosed.

We estimate that the project could be completed, including the writing of a report, in three to four months. The major determinant, and major unknown, in this estimate is the time required to complete the interviews. Coding and some other processing of the data can begin before all the interviews are completed. Machine processing of the completed data will be done by computer in a day or two. And writing of the report will require less than two weeks. Hence, time interviewing in the field is the key factor. We hope to secure the cooperation of an appropriate judge who would sign letters to members of the sample urging their cooperation. Such a letter would presumably minimize problems in the field, and an item for such a letter is included on the enclosed budget.

The enclosed budget for 1,000 interviews is largely self-explanatory, except for the provision noted above that it may be scaled downward somewhat if we decide that we can settle for a smaller number of interviews. However, since some of the costs do not vary with the number of interviews, it cannot be scaled down very much. Somewhere between $1,500 and $2,000 seems to be the maximum possible reduction (for a sample of roughly 600). Another possible saving would be the use of voluntary interviewers. But, to be on the safe side, volunteers would have to be a minority of the interviewing staff. I could undoubtedly get student volunteers from Columbia College and from the Columbia Law School. But students have other commitments, and we should not rely on unpaid student labor alone. I should also note that the item for University overhead is a standard, unavoidable feature in all subsidized research except research by lone scholars, i.e., all subsidized research carried out officially by University bureaus and institutes, and making extensive use (as this study would) of university facilities.

Since our budget requirements are considerably greater than the usual grants of the Rabinowitz Foundation, we are also applying to other sources. We are applying to the Vera Foundation and to some private individuals who have expressed an interest in the project. It is therefore not possible at this time to state how much we would like to request of the Rabinowitz Foundation. It would be quite helpful if the Foundation could make an exception in this case -- given the expensive character of the research required -- and make a grant that is more generous than usual. If that is not possible, we would of course be grateful for any grant that the Foundation is able to give.

In addition to the enclosures noted above -- the paper on survey data as evidence, a budget for 1,000 interviews, and my vita -- I am also enclosing a copy of the latest report of the Bureau of Applied Social Research.

Very truly yours,

Vernon K. Dibble
Assistant Professor

vkd:sl
encs.

copy to Basil Pollitt Esq.

COLUMBIA UNIV
BUREAU OF
APPLIED ~~SOCIAR~~ SOCIAL
RESEARCH

BASIL R. POLLITT
ATTORNEY AT LAW
52 SIDNEY PLACE
BROOKLYN, N. Y. 11201
ULSTER 5-6505

October 30, 1966

Carl Rachlin, Esq.
150 Nassau St.
New York, N.Y.

Re: Chestnut v. N.Y.

Dear Carl:

I have received the DA'S answering brief. I now see a vital function for a brief amicus.

The DA'S psoition is a paean to the New York, Grand Jury. Particularly he praises the Agron case as a guarantee of fair composition.

It seems to me a brief amicus that simply took issue with this position and says Agron is no guarantee, it upholds a grand jury composition of 3 Porto Ricans out of 2,000. It is a denial of equal protection. It is a reason for and an example of the need of federal removal.

Straus could be invaluable.

Also our time schedule is getting tight, on preparing for a hearing on Grand Jury composition. As we left it we had two plans:

1. An approach to Oliver Sutton for him to help determine Grand Jury composition.

2. An approach to the Straus millions, to aid the survey Columbia is prepared to do.

It seems to me both Straus and Sutton should want good relations with CORE.

Very truly yours,

Basil R. Pollitt

Chestnut?

November 2, 1966

Asher Lans, Esq.
Land and Fink
360 Lexington Avenue
New York, New York

re: Straus v. Hanley

Dear Asher:

I have been trying to reach you without success for some time. I have had many talks with Basil Pollitt, who has been for some years very active as a volunteer attorney in civil rights and civil liberties cases. As you know, he is one of the attorneys in the Chestnut case. He has just written to me a leeter which indicates,=in his view, the necessity for an immediate *amicus* brief in the Chestnut case, particularly since the district attorney in that case praises the current grand jury system to the sky as a guarantee of a fair blah, blah, blah. Pollitt points out, for example, that only three Puerto Ricans have sat, out of a total of 2,000 grand jurors.in New York County.

Basil is also interested in setting up a program with you and me and perhaps in conjunction with Columbia University, which would involve a more detailed study of the grand jury system, showing that in fact as well as by statute and practice Hanley (or his equivalent in other counties) is discriminatory.

Basil reminds me that Oliver Sutton, Percy's brother, is now the Jury Commissioner of New York County and presumably would be interested in a proper analysis of the grand jury composition. I would like to discuss this matter with you, as well as the *amicus* brief.

Sincerely,

Carl Rachlin
General Counsel

CR:ms

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020
CABLE: SIMASH

January 24, 1967

Carl Rachlin, Esq.
Scholarship and Defense Fund
Room 1030
150 Worth Street
New York, New York

Re: Straus v. Hanley, et al.
Index No. 5401/1966

Dear Carl:

I enclose herewith two (2) copies of the Brief.

At the request of the State, we have adjourned the motions until February 8, 1967. Among other things, it means that we can make a reasonable number of changes in the Brief before submitting to the Court. Please let me have your thoughts.

The State and City are due to serve their reply Briefs on February 3, 1967, so doubtless I will be leaning all over you on the 4th and 5th.

Best personal regards,

Sincerely,

ABL/pd
Enclosures

February 6, 1967

Asher Lans, Esq.
Lans & Fink, Esqs.
300 Lexington Avenue
New York, New York 10017
Re:Straus v.Hanley

Dear Asher:

I have gone over the supplemental brief to the [illegible] as soon as it was delivered to me and I have a few [illegible] whatever they may be worth.

In regard to Point II beginning on page 2, the [illegible] is really [illegible]. They [illegible] whether a property qualification is a [illegible] test for jury or Grand Jury service. All the [illegible] as to making the various [illegible] with the question [illegible] the history and [illegible] discuss the [illegible] for this purpose.

But trying to [illegible] though it [illegible] even though there may not have been a single [illegible] at the time the statute was originally [illegible] less [illegible]stitutional because of its original [illegible] in Justice [illegible] terms is, what is the [illegible] discriminatory. Nor do [illegible] ages.

[illegible]

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020
CABLE: SIMASH

March 3, 1967

Carl Rachlin, Esq.
S.E.D.F.
150 Nassau Street
New York, N.Y.

Re: Straus et al v. Hanley

Dear Carl:

I enclose herewith copy of Reply Brief we submitted in court last week.

At the suggestion of the City Corporation counsel, the State and the individual defendants will file answers forthwith. They are going to move for summary judgment. We are going to move for cross motions for summary judgment. We have collectively asked the Court (which has agreed) not to rule upon our motions to intervene and to file an amended complaint and the defendants' motion to dismiss for lack of standing, until cross motions for summary judgment are made. The Court agreed to this and accordingly the procedural and substantive issues will be decided simultaneously.

Straus has a project under way, in which he hopes to involve Columbia Law School to draft legislation for a new method of selecting grand juries. Will you please telephone me about this. Best regards.

Sincerely yours,

al/cb
encl.

Dear Asher

1.

Straus v Hanley

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020
CABLE: SIMASH

April 26, 1967

Carl Rachlin, Esq.
Scholarship and Defense Fund
150 Nassau Street
New York, New York 10038

File

Dear Carl:

Re: Straus v. Hanley

The District Attorneys' Association of the State of New York has intervened in this case on behalf of the defendants, the legal counsel being Bert Roberts of the Bronx County District Attorney's Office.

I enclose herewith a copy of their brief, which is a lot better than any heretofore filed by our opponents. I am drafting a reply.

As you doubtless know, legislation has been adopted abolishing the property requirement for jury service as of September 1, 1967.

Assistant District Attorney Roberts has suggested that we confer with him with a view towards dropping the case, and preparing suggestions for changes in the Grand Jury selection procedures and recommendations for legislative changes. In this connection he has loaned me, which I am currently reading, the record in the Rodriguez case, in which, as you know, Judge Carney decided that there was no factual discrimination in the Bronx against Puerto Ricans as jurors.

From the portion of the Rodriguez record I have read so far, it would appear that the County Clerk's office is making determined albeit very unsuccessful efforts to secure both Negro and Puerto Rican grand jurors. One reason for the lack of success is, of course, the pattern of legislation, in terms of insufficient compensation of the grand jurors, and the rule that civil servants may not serve, etc.

I doubt that we will be able to work anything out with Roberts, but I think it would be a mistake not to try.

Will you give me a phone call about this at your earliest convenience and let's discuss the situation.

Best regards.

Sincerely yours,

AL:be

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG
GORDON ZIMMERMAN

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020
CABLE: SIMASH

April 27, 1967

Carl Rachlin, Esq.
Scholarship & Defense Fund
150 Nassau Street
New York, New York
Room 1030

RE: Straus v. Hanley

Dear Carl:

We have an appointment with Assistant District Attorneys Roberts and Sullivan and various representatives of the Bronx County Clerk's Office on Tuesday, May 9, 1967, 4:00 P.M. at the Bronx D.A.'s Office. If this is not convenient, please let me know at once.

I will let you know in a day or two exactly what the time is for the luncheon appointment with Straus on May 3, 1967.

With best regards,

Sincerely yours,

AL:MAS

File Straus v Hanley

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020

CABLE: SIMASH

May 2, 1967

Carl Rachlin, Esq.
150 Nassau Street
New York, N. Y.

Charles S. McClain, Esq.
722 Rosedale Avenue
Bronx, N. Y.

Miss Amalia Betanzos
207 W. 106th Street
New York, N. Y.

Re: Straus v. Hanley, et al

Dear Sirs and Miss Betanzos:

We enclose herewith copy of Reply Brief we have just filed in the above captioned case.

The purpose of this additional reply memorandum was to answer certain contentions asserted by the Bronx County District Attorney in defense of the grand jury selection system, submitted on behalf of the New York State District Attorneys' Association.

Sincerely yours,

LANS & FINK

By

AL:gp
Enc.

June 19, 1967

Hon. Bernard Botein
Presiding Justice
Appellate Division
First Department
New York Supreme Court
Madison Avenue & 25th Street
New York, N. Y.

Dear Judge Botein:

When you were kind enough to meet with Mr. Nathan Straus and myself recently, you suggested that it would be appropriate for us to submit to you a memorandum regarding our proposals for changes in the composition of Grand Juries. We submit this letter at this time, with the thought certain of its suggestions might be submitted to the forthcoming meeting of the Judicial Conference of the State of New York.

This letter embodies not only Mr. Straus' views, but also certain suggestions of The National Association For Puerto Rican Civil Rights and of The Congress of Racial Equality.

Our research originated because of the fact that Grand Jury panels in the counties in and surrounding New York City do not proportionately reflect the ethnic and occupational groups which comprise the population. We are, of course, aware of the difficulties of reforming the Grand Jury selection procedures. We do not believe we have developed any magic panaceas. We do, however, believe that it would be appropriate for the Judicial Conference to appoint a Commission of jurists, attorneys and civic leaders representative of various groups to evaluate proposed methods for empaneling Grand Juries, which will constitute truer cross-sections of the entire community.

A. THE FACTS DEMONSTRATING THAT GRAND JURIES DO NOT CONSTITUTE TRUE CROSS-SECTIONS OF THE COMMUNITY

1. While the County Jury Boards have the statutory responsibility for preparing the rolls from which the County Grand Jury Lists are made up, it is obvious that the various County Clerks, since they supply the lists of prospective jurors, actually have the decisive role.

2. Recent studies show that the Grand Jury Lists in the counties comprising and surrounding New York City systematically under-represent Negroes, Puerto Ricans, manual workers, day-laborers and women.

3. The trial transcript in *People* v. *Eugene Rodriguez* (Supreme Court, Bronx County, No. 1430/66) furnishes the following information with regard to Bronx County selection procedures:

(a) The Bronx Grand Jury List for 1966 included 875 persons.

(b) An analysis of the testimony in the *Rodriguez* case indicates that, in all probability, there were no more than 20 Puerto Ricans on the 1966 Bronx County Grand Jury List. (pp. 319, 321, 478, 637 of the *Rodriguez* trial transcript.)

(c) According to New York City Board of Health statistics, 18.5% of the population of Bronx County in 1964 constituted Puerto Ricans. (*Rodriguez* transcript, p. 154.) This contrasts with less than 2.5% of the Bronx County Grand Jury List in 1966.

(d) Examination of the occupational entries contained on the 1966 Bronx County Grand Jury List shows that only 7 of the 875 persons included in the panel were non-clerical workers.

4. In 1963 Professor Joseph McGoldrick of Queens College (a former Controller of the City of New York) studied the composition of the Queens County Grand Juries over a 4-year period. This study demonstrated that:

(a) 76.5 per cent of jurors in the sample were engaged in managerial or professional work as opposed to 25.8 per cent in the county.

(b) 67.8 per cent of jurors in the sample earned more than $10,000 per year compared with 52.4 per cent of the population in the county earning between $3000-$6999.

(c) 94.3 per cent of jurors in the sample were male as compared with 47 per cent in the total population of the county.

5. A 1964 random sampling of 250 grand jurors in Nassau County produced the following results:

(a) One per cent of jurors surveyed were employed as service workers, household workers or laborers compared with 26.6 per cent in this category county-wide.

(b) 88.5 per cent of the jury list was composed of professional, technical, managerial and proprietary persons as opposed to only 31.4 per cent in the county in this category.

(c) 10.5 per cent were employed as clerical, sales and kindred workers compared with 41.8 per cent in the county in this category. (Letter from Eugene H. Nickerson, County Executive, Nassau County to the Honorable George J. Beldock, Presiding Justice, Supreme Court, Appellate Division, Second Department, Jan. 29, 1964.)

6. One major reason why Grand Juries are not truly representative of the communities wherein they sit is that the service of grand jurors tends to be perpetuated. See *In re Grand Jurors Association*, 25 N.Y.S. 2d 154 (1941). In the *Rodriguez* case, John F. Murray, Deputy Bronx County Clerk in charge of the Jury Division, testified that the starting point for selecting grand jurors is still the redesignation of persons who have served in the immediately preceding years. (Trial transcript, p. 235, *et seq.*)

7. A major factor in reducing the percentage of women who appear on Grand Jury panels is that they are not summoned for service at all, although permitted to volunteer. (*Rodriguez* trial transcript, pp. 261, 267.)

B. CHANGING COMMUNITY AND JUDICIAL ATTITUDES

8. The statutes, rules and procedures used in the selection of Grand Jurors in New York have, of course, been sustained in the past by both the Federal and State courts. However, it is respectfully suggested that the recent Federal cases indicate that the New York Grand Jury selection procedures are not incompliance with the equal protection clause of the 14th Amendment, as it is currently construed.

9. For instance, in *Chestnut* v. *The People of the State of New York*, 370 F. 2d 1, at 6-8 (2d Cir. 1966), cert. den. 35 U.S.L.W. 3366, Judge Kaufman stated: "We are confident that in light of recent decisions by the Supreme Court and federal appellate courts in other Circuits, that New York will give careful consideration to the very serious constitutional issues that appellants raise concerning the State's Grand Jury selection procedures. ... The characterization in the State's brief ... of the appellants' attack on the validity of the Grand Jury as 'quite obviously *** a lot of nonsense' leads us to believe that the State does not appreciate recent developments in this area of the law." (370 F. 2d 1 at 6-7 and footnote 13).

10. We do not doubt the good faith of the county Jury officials in attempting to provide proper representation on the panels for members of minority groups. We submit, however, that the present practice of piecemeal proselytizing of members of minority groups for Grand Jury service has not succeeded. Similarly, no meaningful attempt has been made to secure proper representation of manual workers upon Grand Jury panels.

11. In Rabinowitz v. United States, 366 Fed. 2d 34 (C.C.A. 5th 1966) the United States Court of Appeals agreed that the local jury commissioners had not specifically intended to exclude Negroes from juries. The court, however, stated: "The jury commissioners must be held to have intended the natural result which flowed from their conduct. * * * The Constitution and laws of the United States place an affirmative duty on the court clerk and the jury commissioner to develop and use a system that will probably result in a fair cross-section of the community being placed on the jury rolls." Id. at 37. See also Whitus and Davis v. State of Georgia, U.S. Supreme Court, Nos. 650 and 253, October Term, 1966, United States Law Week, January 24, 1967, p. 4176; see Labat v. Bennet, 365 F. 2d 698 (C.C.A. 5th, 1966, en banc.)

12. In the Chestnut case, supra, Judge Kaufman pointed out that if New York did not take independent action to rectify whatever difficulties exist in the State's Grand Jury system, the Federal courts possessed adequate remedies, which they would doubtless effectively utilize. See also Fay v. Noia, 372 U.S. 391; City of Greenwood v. Peacock, 384 U.S. 808, at p. 829 (1966).

13. We do not, however, wish to present the issue on a purely juridical basis. For we believe that, in the words of the United States Supreme Court, all good citizens share the view that jury panels should "be a body truly representative of the community." Smith v. State of Texas, 311 U.S. 128, 130.

14. It would be most appropriate for the State to take independent action on its own, and before the incidence of Federal intervention, to provide complete compliance with the equal protection clause of the 14th Amendment in the selection of Grand Jurors. Cf. Kelly-Sullivan, Inc. v. Moss, 174 Misc. 1098, 22 NYS 2d 491, at 500 (1940).

C. SUGGESTIONS FOR CHANGES IN THE APPLICABLE STATUTES AND RULES

15. More than 20 years ago, Judge Desmond stated that "... grand jurors must be chosen by lot from the people of the vicinage, subject to challenge for lawful reasons only."* People v. Prior, 294 N.Y., 405, 422.

16. To secure a true cross-section, it is respectfully suggested that Grand Jurors should be selected at random from the same lists and in the same manner as petit jurors. This is the method of selection set forth in legislation recently introduced in Congress at the request of President Johnson. (Sec. 1866, Senate Bill 989, 90th Congress, 1st Session.)

17. The fairest basis for such random selection would seem to be the lists of enrolled voters. To insure proportionate selection of members of minority groups, it is recommended that the random selection be made by assembly districts, within counties, with each assembly district being alloted a number of jurors, pro rated to its share of the total population of the county.

18. Obviously, wage earners (including the overwhelming majority of the minority groups in the population) may find it difficult to serve on juries under the present compensation arrangements. It would seem appropriate, to permit wider exercise of this right of citizenship, to increase compensation to $20 per day for both grand and petit jurors and to provide extra compensation of $10 per day for protracted service as a grand or petit juror. (Insofar as the counties within the City of New York are concerned, such a change would require an amendment to Section 749-a of the Judiciary Law.)

Section 749(b) of the Judiciary Law presently gives discretion to a judge to award extra compensation to petit jurors in certain cases. We feel this Section should be amended to make such compensation automatic for all "protracted service."

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* The quoted language appears in a dissenting opinion in which Judge Desmond was joined by Judges Loughran and Dye.

19. In order to permit the ordinary citizen to serve upon a Grand Jury, it is respectfully suggested that the regular period of service thereon should be two weeks. Any service for a longer period should be considered as "protracted service", both for purposes of compensation and to permit individuals to claim a personal exemption.

20. In the random selection of persons to serve as Grand Jurors, it is recommended that present administrative practice of not calling women be eliminated, while retaining the right of a woman to claim a personal exemption from such service.

21. It is believed that a disproportionate percentage of the educated Negro and Puerto Rican population of the State is employed by governmental agencies. The blanket disqualification of civil service employees contained in Section 598 of the Judiciary Law appears to have its origin in the Medieval concept that employees of the State could not act impartially in legal proceedings commenced by the State. It is respectfully suggested that consideration be given to the elimination of this blanket disqualification.

22. Section 610 of the Judiciary Law contains language intended to create job security for persons who serve upon juries. Many wage earners have suggested that their employers use pressure to prevent their jury service. It would appear appropriate to investigate as to whether job security is actually created by Section 610 of the Judiciary Law, and if not, to consider alternate methods of protection.

23. Section 596(6) of the Judiciary Law contains the vague requirements that jurors "be intelligent; of sound mind and good character; well informed ...". It is respectfully suggested that these vague requirements bespeak a jury of "superior citizens", which appears to be proscribed by the 14th Amendment. See Labat v. Bennet, 365 F. 2d 698 (C.C.A. 5th, 1966, en banc.)

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We believe that consideration should be given to adopting only objective criteria, as contemplated by Section 1865 of the proposed Federal Jury Selection and Service Act of 1967, i.e., citizenship, literacy, absence of disabling infirmity and absence of a criminal record.

D. CONCLUSION

24. The suggestions made in part C of this letter are submitted for consideration only. They doubtless require further scrutiny, refinement and supplementation.

25. In view of the importance of divising proper methods for Grand Jury selection, doubtless many professional and civic organizations will have their own views. We therefore wish to repeat our original suggestion that the Judicial Conference appoint a Commission of jurists, attorneys and civic leaders to consider methods for revising the Grand Jury procedures. Ideally, such a Commission should be given a reasonable appropriation with which to retain a competent professional staff and to conduct public hearings. Of course, Mr. Straus has devoted much time, thought and effort to this problem and would be very pleased to participate actively in such a Commission, should the Conference see fit to provide for its establishment.

Respectfully submitted,

Asher Lans

AL:gp

File
Straus v Hanley

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG
GORDON ZIMMERMAN

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020
CABLE: SIMASH

June 22, 1967

Carl Rachlin, Esq.
150 Nassau Street
New York, N. Y.

Re: Straus v. Hanley, et al

Dear Carl:

Nathan and I met with Judge Botein about two weeks ago. Hyman Gamso, who, as you know, is Chief Clerk to the Appellate Division, was also present.

Judge Botein seemed quite familiar with the case. He began by telling us that if we discuss the case in any detail, he would have to disqualify himself when and if it came to the Appellate Division. The Judge went on to say he would be happy to discuss with us general devices for improving Grand Jury selection, without discussing the case, as such.

Nathan and I then had a brief discussion with the Judge, in which, besides presenting our views, we told him of the discussion we had had with Assistant District Attorney Roberts.

Judge Botein then told us that he thought it would be appropriate to prepare a memorandum on the general subject which he could consider, and then present to the June meeting of the Judicial Conference. It was Judge Botein's thought that the appropriate procedure would be for the Judicial Conference to appoint a committee to consider the subject, since the Judicial Conference had funds which could be used to employ staff, conduct public hearings, publish a report, etc. Judge Botein also said that if such a committee were appointed, he would use every possible effort to make sure that Nathan was given a prominent role.

Judge Botein went on to say that if the Judicial Conference took no action, he would see if Judge Beldock and he could not appoint some sort of informal committee. He suggested that it was important to secure Judge Beldock's cooperation, because jury discrimination was more rampant in Queens and Nassau than in the First Department. (Judge Botein said that neither Judge Beldock nor he had any funds which could be used by such a committee, unless the funds were derived from the Judicial Conference. However, both Nathan and Judge Botein expressed the view that funds could be obtained from a number of foundations, if the two presiding justices of the Appellate Division wished to sponsor a research project.)

We have not called any of this to the attention of Assistant District Attorney Roberts, nor have we had any further discussion with his office.

I prepared a lengthy memorandum which was submitted to Judge Botein. I enclose herewith two copies, for your convenience.

Will you call me at your convenience, so that we can discuss the whole situation.

Sincerely yours,

AL:gp

Straus v Hanley

Supreme Court Appellate Division
First Department
27 Madison Avenue
New York 10, N.Y.

Bernard Botein
Presiding Justice

June 30, 1967

Asher B. Lans, Esq.
360 Lexington Avenue
New York, N.Y. 10017

Dear Mr. Lans:

I did not submit the subject matter of your letter of June 19 to the Administrative Board at its June 22 meeting because Presiding Justice Beldock was ill and could not attend. You will recall that it was my belief that the First Department should not initiate a study as suggested by Mr. Straus because the problem was a state-wide one, and more specifically, a New York City one. Therefore, the collaboration of Judge Beldock is essential.

I have spoken with Judge Beldock and he agrees that the Administrative Board should give serious consideration to launching the indicated study. I have therefore spoken with Honorable Thomas F. McCoy, the State Administrator, and followed up by sending him your letter together with my recommendation that the Administrative Board undertake this study.

Sincerely,

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020

CABLE: SIMASH

July 3, 1967

Mr. Nathan Straus
250 West 57th Street
Room 602
New York, New York

RE: Straus v. Hanley

Dear Nathan:

I enclose herewith self explanatory copy of the letter I have just received from Judge Botein. Obviously, the matter is proceeding as well as can be expected.

I have acknowledged Judge Botein's letter, but I suggest you do so also.

Best regards,

Sincerely yours,

AL:MAS
Enc.
cc: Carl Rachlin, Esq.

THE JUDICIAL CONFERENCE
OF THE
STATE OF NEW YORK
270 BROADWAY
NEW YORK, N. Y. 10007
BARCLAY 7-1616

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ROCCO A. PARELLA

THOMAS F. McCOY
STATE ADMINISTRATOR

July 6, 1967

Asher B. Lans, Esq.
Lans & Fink
360 Lexington Avenue
New York, New York 10017

Dear Mr. Lans:

Presiding Justice Botein forwarded to me your letter of June 19, 1967. I discussed your letter with Chief Judge Fuld; and he suggested, and I concur, that this should be referred to the committee which is at present conducting an exhaustive study of the entire jury system including the Grand Jury. This committee is composed of members of the New York State Judiciary with Justice William B. Groat as Chairman.

I am sure Judge Groat will contact you after his committee has completed the initial phase of this study.

Sincerely,

Thomas F. McCoy
State Administrator

cc: Presiding Justice Botein
Justice Groat

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020

CABLE: SIMASH

July 11, 1967

Mr. Nathan Straus
250 West 57th Street
Room 602
New York, N. Y.

Re: Straus v. Hanley, et al

Dear Nathan:

I enclose herewith copy of a letter which I have just received from Thomas F. McCoy, Administrator of the Judicial Conference of the State of New York.

Do you have the feeling this is the beginning of a run-around?

In any event, I think Carl, you and I should meet to discuss the situation.

I am sending a copy of this letter and a copy of Mr. McCoy's letter to Carl.

Best regards.

Sincerely yours,

AL:gp
Enc.
cc: Carl Rachlin, Esq.

LANS & FINK
ATTORNEYS

ASHER B. LANS
NORMAN S. FINK
STEPHEN J. FEINBERG
GORDON ZIMMERMAN

FOREIGN LAW COUNSEL
BRUCE WAYNE

360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
212 OXFORD 7-0020

CABLE: SIMASH

October 17, 1967

Carl Rachlin, Esq.
150 Nassau Street
New York, New York

RE: Straus v. Hanley

Dear Mr. Rachlin:

I enclose herewith a copy of Judge Spector's decision in the above case.

The decision is a perplexing one to say the least.

Sincerely yours,,

STEPHEN J. FEINBERG

SJF:MAS
Enc.

As Judge Chase stated in the Schieffelin case:

"Jurisdiction has never been directly conferred upon the courts to supervise the acts of other departments of government. The jurisdiction to declare an act of the Legislature unconstitutional arises because it is the province and duty of the judicial department of government to declare the law in the determination of the individual rights of the parties.

"The assumption of jurisdiction in any other case would be an interference by one department of government with another department of government when each is equally independent within the powers conferred upon it by the Constitution itself." (supra, 212 N.Y. p. 530, 106 N.E. p. 677, L.R.A.1915D, 485).

This concept was later advanced by Mr. Justice Black in Perkins v. Lukens Steel Co., 310 U.S. 113, 132, 60 S.Ct. 869, 879, 84 L.Ed. 1108, when he said: "Our decision that the complaining companies lack standing to

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sue does not rest upon a mere formality. We rest it upon reasons deeply rooted in the constitutional divisions of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public."

The judgment appealed from should be affirmed, without costs.

FULD, Judge (dissenting).

The plaintiff, seeking to prevent the alleged misapplication of more than $42,000,000, sues as a citizen and taxpayer for a judgment declaring that section 45–a of the Pari-Mutuel Revenue Law (added by L.1956, ch. 837) McK.Unconsol.Laws, § 8020, violates the constitutional prohibition against the expenditure of public funds to private parties (N.Y. Const. art. VII, § 8).[1] The courts below dismissed the complaint and we are called upon to decide whether this State shall continue to be one of the very few remaining jurisdictions to adhere to the rule that a citizen-taxpayer, who cannot show any direct or personal injury, lacks standing to challenge allegedly unconstitutional expenditures of state moneys.

Although the rule is one which, judicially formulated, has been applied by this court for more than 100 years (see, e. g., Doolittle v. Supervisors of Broome County, 18 N.Y. 155; Kilbourne v. St. John, 59 N.Y. 21, 27; Schieffelin v. Komfort, 212 N.Y. 520, 106 N.E. 675, L.R.A.1915D, 485; Bull v. Stichman, 298 N.Y. 516, 80 N.E.2d 661; Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541, cert. den. 339 U.S. 981, 70

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[1] We know from earlier litigation that this is no specious charge or feigned controversy. In Matter of Roosevelt Raceway v. Monaghan, 9 N.Y.2d 293, pp. 303, 311–315, 213 N.Y.S.2d 729, 733–734, 740–744, 174 N.E.2d 71, 74, 79–82, not only did the court expressly reserve the very question here sought to be raised but one judge actually expressed the view that section 45-a was "constitutionally invalid" in its entirety (per Dye, J., concurring).

S.Ct. 1019, 94 L.Ed. 1385),[2] it has not only been sharply criticized by authoritative writers on the subject (see, e. g., 3 Davis, Administrative Law Treatise [1958], § 22.09, p. 243 et seq., § 22.10, p. 249 et seq.; Davis, Standing to Challenge Governmental Action, 39 Minn.L.Rev. 353, 386 et seq.; Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv.L.Rev. 1265; Note, Taxpayers' Suits, 69 Yale L.J. 895) but rejected by the courts of many jurisdictions. (See 3 Davis, Administrative Law Treatise, op. cit., p. 245; Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv.L.Rev. 1265, 1278.)

At the present time, virtually every state, either by decision or by statute—New York, by section 51 of the General Municipal Law, Consol. Laws, c. 24—permits taxpayers to challenge *local* action and at least 34 states clearly sanction taxpayers' suits at the state level, that is, actions by state taxpayers challenging state action; indeed, only two states—New York and New Mexico—squarely prohibit such actions. (See Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv.L.Rev. 1265, 1278; Note, Taxpayers' Suits, 69 Yale L.J. 895, 900–902.)[3] "This trend", it has been said, "reflects the absence of significant reasons for distinguishing municipal taxpayers' suits, permitted practically everywhere, from their state counterparts. True, the taxpayer's contribution to the state treasury may be a lesser percentage of the total than his municipal tax payments, and his interest in state affairs might therefore be said to be more remote. But no overriding considerations—such as the need for executive flexibility on the national level in foreign affairs and defense—make review of state action less desirable than review of the affairs of local government." (Note, Taxpayers' Suits, 69 Yale L.J. 895, 902.)

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[2] It is difficult to reconcile the cited cases with those involving challenged official action with respect to nonfiscal matters. (See, e.g., Matter of Cash v. Bates, 301 N.Y. 258, 261, 93 N.E.2d 835, 836; Matter of Kuhn v. Curran, 294 N.Y. 207, 213, 61 N.E.2d 513, 515–516; Matter of Andresen v. Rice, 277 N.Y. 271, 281, 14 N.E.2d 65, 69–70; 3 Davis, Administrative Law Treatise, op. cit., pp. 249–250.) In the Cash case (301 N.Y. 258, 93 N.E.2d 835, supra), for instance, the court held that "the erroneous appointment * * * ought to be open to attack by the petitioners, because as citizens and taxpayers they are entitled to an opportunity to insist upon the construction which this court placed upon the civil service article of the State Constitution" (301 N.Y. p. 261, 93 N.E.2d p. 836).

[3] The Federal courts also deny standing to taxpayers attacking Federal expenditures. (See, e.g., Com. of Massachusetts v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078.) However, the Supreme Court in the Mellon case differentiated between taxpayers attacking the expenditures of the Federal Government and those challenging the expenditure of local funds. (See, also, Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; Everson v. Board of Educ., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711; Hart and Wechsler, The Federal Courts and the Federal System [1953], pp. 160–162.) Thus, observed the court in Mellon (262 U.S., at p. 486, 43 S. Ct., at p. 601, 67 L.Ed. 1078), "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court."

Of this there can be no possible doubt. The State has a vital concern, its People a deep interest, in seeing to it that the provisions of our Constitution are enforced, and unconstitutional

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expenditures of state funds prevented. Neither logic nor policy demands that the judiciary stay its hand and dismiss the action simply because the proceeding happens to be initiated by a vigilant and civic-minded taxpayer following official inaction. It hardly seems consonant with the Constitution itself that the enforcement of its provisions should have to turn on the meaning ascribed to it by members of the executive or administrative branch of government or on whether they choose to assert themselves.

It is self-evident that the denial of standing to a taxpayer will in most instances prevent any challenge to an expenditure of state funds as violative of the Constitution. The suggestion in the opinion of the majority that the Attorney-General and other state officials may be relied upon to attack the constitutional validity of state legislation is both unreal in fact and dubious in theory. As to the Attorney-General, for example, it would seem more appropriate to his office that he defend a statute's constitutionality when it is challenged than initiate an attack of his own. (Cf. Executive Law, Consol.Laws, c. 18, § 71; and see, e. g., Matter of Roosevelt Raceway v. Monaghan, 9 N.Y.2d 293, 213 N.Y.S.2d 729, 174 N.E.2d 71.) Certainly, our Constitution does not entrust the determination of constitutionality to the executive branch of the government. But, in any event, if there is an official who is authorized to act and he declines to assert the invalidity of the statute, or otherwise raise that issue, the question whether the expenditures made pursuant to the statute's provisions violate the State Constitution will never be subjected to judicial scrutiny.

The Constitution is a People's document and the hypothesis that a citizen-taxpayer has no "interest" in state expenditures is little more than a legal fiction. It cannot be squared with the generally accepted doctrine that a taxpayer on the municipal level—where the issues are rarely of comparable importance—does possess the requisite "direct and immediate" interest to warrant his bringing an action to challenge the expenditure of municipal funds. (Com. of Massachusetts v. Mellon, 262 U.S. 447, 486, 43 S.Ct. 597, 67 L.Ed. 1078, supra.) And, beyond that, as the Illinois Supreme Court declared in a case involving the alleged misappropriation of state moneys, the taxpayers' "ownership of such funds and their liability to replenish the public treasury for the deficiency", which might be occasioned by their misuse, should be

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deemed sufficient to supply the essential basis for standing. (Turkovich v. Board of Trustees of Univ., 11 Ill.2d 460, 464, 143 N.E.2d 229.)

Little is to be gained by extended discussion of the few arguments which have been put forward to support perpetuation of the rule denying standing to taxpayers on the state level, and I consider briefly but two of them.

Less than persuasive is the claim that the court's assumption of jurisdiction in these suits in the face of inaction by the executive branch of government charged with the responsibility of preventing the waste of public funds "would be an interference by one department of government with another". (Schieffelin v. Komfort, 212 N.Y. 520, 530, 106 N.E. 675, 677, L.R.A.1915D, 485, supra.) Fundamental to our form of government is the principle that determination of the constitutionality of legislation is essentially a judicial function. And, this being so, it is difficult to understand how it may be said that a court, in making such a determination, would be interfering with another branch of government, or usurping the latter's powers simply because it acts in a case initiated by a taxpayer. In brief, litigation such as this calls upon the courts to assess the constitutional validity of legislation, not to supervise the acts of another branch of government.

Nor do I find any basis for the concern—expressed in the Doolittle case (18 N.Y. 155, 162, supra) and elsewhere—that opening the doors of the court to taxpayers would cause a flood of actions by officious meddlers. If there ever was reason for such a fear, it has been completely dispelled by the experience not only of the many jurisdictions where taxpayers' suits on the state level have long been sanctioned but, indeed, of our own State of New York under the statute permitting municipal taxpayers to challenge the action of local officials (General Municipal Law, § 51). The New Jersey high court accurately appraised the situation when many years ago it observed that "The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation, and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks." (Ferry v. Williams, 41 N.J.L. 332, 339; see Davis, Standing to Challenge Governmental Action, 39 Minn.L.Rev. 354, 430.) The courts undoubtedly can be relied upon to discourage and prevent baseless taxpayers' suits by insisting that the action pose an issue of general public importance; that it involve an actual bona fide controversy, not one which is feigned; that all interested parties be represented; that there be no other remedy available; and that the public officials vested with authority to bring an action shall have refused to do so. All of these conditions have been met in the case before us.

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In sum—although the Legislature could, of course, remove the taxpayer's disability at a stroke, enforcement of the Constitution should not depend upon the will of the legislative branch any more than on that of the executive. The apathy of the average citizen concerning public affairs has often been decried; under the court-made rule now reaffirmed, it is being compelled. I would change the rule.

STATUTORY PRESCRIPTIONS FOR GRAND JURY SELECTION:

CALIFORNIS

Penal Code Annotated: Section 893 - Persons Competent to Act As Grand Jurors:

(1) Must meet the qualifications prescribed by Sec. 198 of the Code of Civil Procedure.

(Code of Civil Procedure Section 198: Must be a citizen of the U.S.; must be 21 years old; must be a citizen of the state and county for at least il year; must be in possessiion of natural faculties and of ordinary intelligence and not decrepit; must possess sufficient knowledge of the English language.

(2) Having met that test, the party is not competent if:
- (a) the person is serving as a trial juror in another court in the state
- (b) has been discharged as a grand juror in any court in this state within a year
- (c) the person has been convicted of malfeasance in office or any felony or other high crime.

Section 894 Exemption from Jury Duty: (lists occupations exempt)

No Constitutional provisions.

MARYLAND

ANNOTATED CODE OFMARYLAND: Vol 5 - Art. 51

Section 1: Age of jurors is 25
Section 3: Occupations exempt
Section 4: No property qualification shall be imposed.

No constitutional provision.

MASSACHUSETTS

Annotated Laws of Mass: Vol 8A - Chapter 234 - Sec. 1: Qualifications and Exemptions

Age of juror - 25-70 years

"A person of either sex qualified to vote for representative to the general court, whether a registered voter or not, shall be liable to serve as a juror, except:(following persons exampted by occupation.)

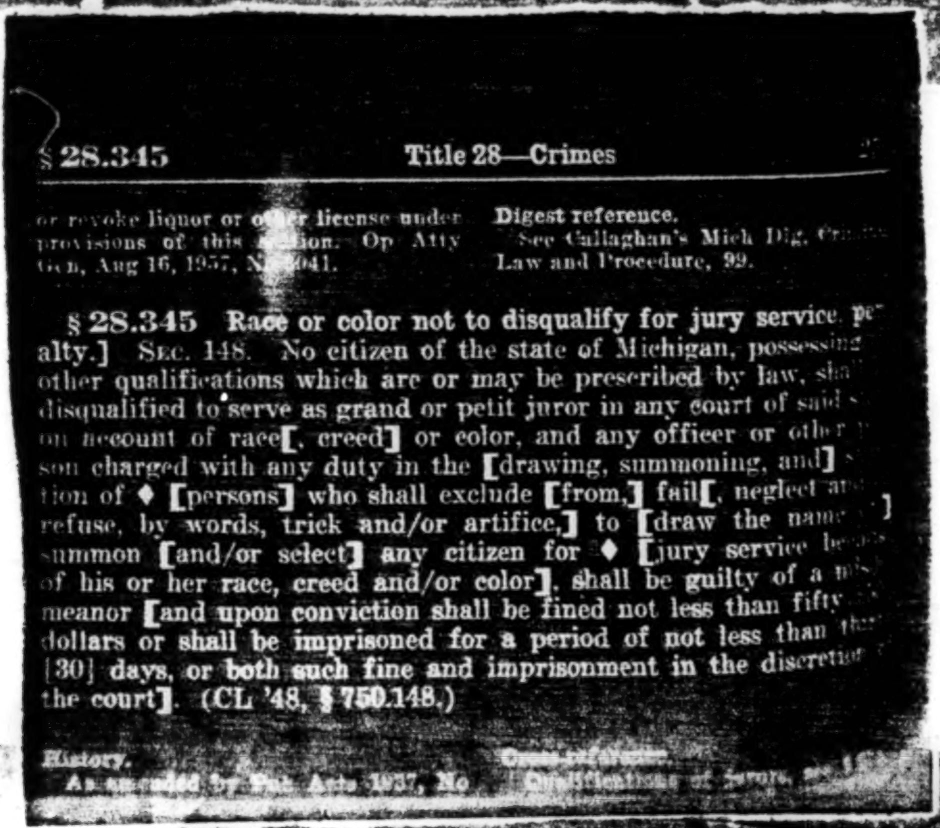
No Constitutional provision

Note: qualification for Grand juror are consistently similar to qualifications for petit jurors so the listed qualification under each state usually are found under Jury Selection - not Grand Jury.

MICHIGAN

Michigan Statutes Annotated: Vol:24 - 27.246 - Race or Color Not to Disqualify for jury Service

Nothing in Constitution
(Couldn't find other qualifications; they were repealed and may have been reenacted.)



§ 28.345 Title 28—Crimes

or revoke liquor or other license under provisions of this section. Op Atty Gen, Aug 16, 1957, No 3041.

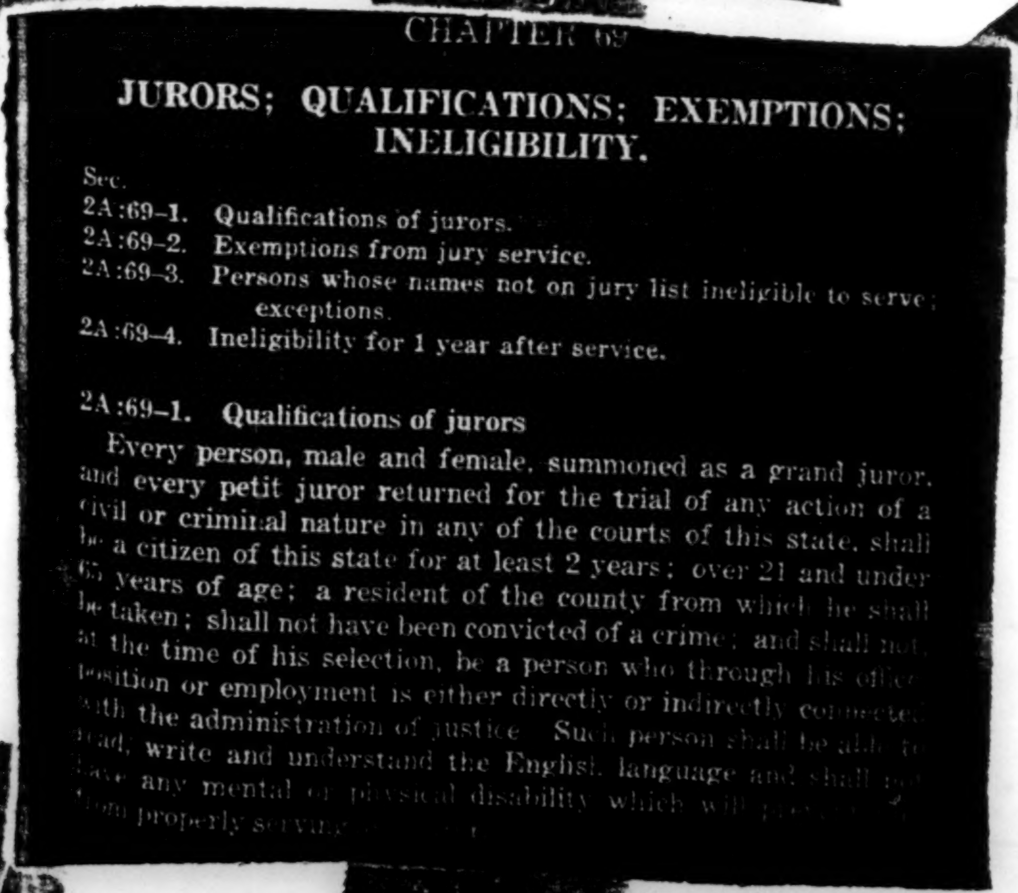
Digest reference.
See Callaghan's Mich Dig, Crim Law and Procedure, 99.

§ 28.345 Race or color not to disqualify for jury service, pe alty.] Sec. 148. No citizen of the state of Michigan, possessin other qualifications which are or may be prescribed by law, sha disqualified to serve as grand or petit juror in any court of said s on account of race[, creed] or color, and any officer or other p son charged with any duty in the [drawing, summoning, and] s tion of ♦ [persons] who shall exclude [from,] fail[, neglect an refuse, by words, trick and/or artifice,] to [draw the name] summon [and/or select] any citizen for ♦ [jury service be of his or her race, creed and/or color], shall be guilty of a mis meanor [and upon conviction shall be fined not less than fifty dollars or shall be imprisoned for a period of not less than th [30] days, or both such fine and imprisonment in the discretio the court]. (CL '48, § 750.148.)

History.
As amended by Pub. Acts 1957, No

Cross-reference.
Qualifications of jurors,

NEW JERSEY



CHAPTER 69

JURORS; QUALIFICATIONS; EXEMPTIONS; INELIGIBILITY.

Sec.
2A:69-1. Qualifications of jurors.
2A:69-2. Exemptions from jury service.
2A:69-3. Persons whose names not on jury list ineligible to serve; exceptions.
2A:69-4. Ineligibility for 1 year after service.

2A:69-1. Qualifications of jurors

Every person, male and female, summoned as a grand juror, and every petit juror returned for the trial of any action of a civil or criminal nature in any of the courts of this state, shall be a citizen of this state for at least 2 years; over 21 and under 65 years of age; a resident of the county from which he shall be taken; shall not have been convicted of a crime; and shall not, at the time of his selection, be a person who through his office, position or employment is either directly or indirectly connected with the administration of justice. Such person shall be able to read, write and understand the English language and shall not have any mental or physical disability which will prevent him from properly serving

NEW YORK

McKinney's Unconsolidated Laws - Section 3813 - Grand Jurors
In counties which have a Commissioner of jurors, he and the board appointing him shall prepare each December from the trial jury list 300 names

Section 3807 - Selection of trial jurors: shall be by the Commissioner who alone makes the selection.

Section 4088 - Qualifications of Jurors
(1) Citizen of the U.S. and resident of the county
(2) Ages 21-70
(3) Owns $150 of real property or
$250 of personal property or
is married to someone who owns either.
(4) in possession of natural faculties
(5) is intelligent, of sound mind and good character, well-informed ; able to read and write the English language understandably
(6) Has not been convicted of a felony or misdemeanor involving moral turpitude.

The Commissioner alone decides on exemptions but the Court may review qualifications upon application.

McKinney's Consolidated Laws - Section 13 of Civil Rights Volume - Right to Serve on Juries: No citizen of the state possessing all other qualifications which are or may be prescribed by law shall be disqualified to serve as a grand or petit juror in any court of this state on account of race, creed, color national origin or sex; violation of this by a person charged to select the jury is a misdemeanor.

Rules of the Jury System in the State of New York (Appendix to Vol 29 - Judiciary - of McKinney's Consolidated laws): specifies number of jurors to be on the jury list on a population.

McKinney's Unconsolidated Laws - Sec. 3907: Every town gets 2 Grand Jurors on the jury list with two for every thousand people This provision relates to counties with over 180,000 population.

The Constituion doesn't cover qualifications

PENNSYLVANIA

Purdons Vol 17:

Second Class County: Section 1276: a list of names is to be compiled from a list of all names of people assessed for taxation.
Section 1277: Commissioner shall pick every 20th name from the taxation list until the jury list is filled
Section 1279: Having compiled the list the Commissioner shall ascertain who are qualified to wit:

(a) He or she shall be a U.S. citizen at least 21 years old, taxed and residing in the county.
(b) no physical or mental disabilities such as will prevent attendance in court or interfere with proper performance of juror's duty
(c) not convicted of a felony
(d) has not served on a jury for the past consecutive 3 years

The commissioner may make inquiries to determine qualifications The Commission may withhold a name from the jury wheel when satisfied that such persons are not qualified or competent to serve as a juror . . . .

Third Class County : Section 1333: Only adult citizens, residents of the county, able to understand the English language shall serve. Persons under indictment and convicted felons not eligible.

Both classes of counties excuse active doctors and lawyers and other standard classes of exceptions as clergy, professional nurses.

[illegible] VS NATHAN vs. HANLEY, JOHN, J. etal COUNTY CLERK & BRONX COUNTY, [illegible]
[illegible] QUALIFICATIONS; RACIAL DISCRIMINATION)

Please Retain Original Order

C 104—Summons without Notice, Blank Court. 4-64. Personal or Substituted Service. c

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80 EXCHANGE PLACE AT BROADWAY, NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 5401/1966

Plaintiff designates Bronx *County as the place of trial*

The basis of the venue is Plaintiff's Residence

NATHAN STRAUS,

Plaintiff

against

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants

Summons

Plaintiff resides at 1108 Wheeler Ave.

County of Bronx

To the above named Defendant

You are hereby summoned *to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within* 20 *days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.*

Dated, April 5, 1966

LANS & FINK
Attorney(s) for Plaintiff
Office and Post Office Address
360 Lexington Avenue
New York, N.Y.10017
OXford 7-0020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

--x

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx
County, and MARIO A. PROCACCINO, Comptroller
of the City of New York,

Defendants.

--x

Plaintiff, complaining of defendants, by LANS & FINK, his attorneys, alleges:

AS AND FOR A FIRST CAUSE OF ACTION:

1. Plaintiff, NATHAN STRAUS, is a citizen of the United States of America and of the State of New York, a resident of the State of New York and a taxpayer of the County of the Bronx, City of New York. Taxpayer NATHAN STRAUS is assessed upon property in the said County of the Bronx, City of New York in assessed amounts exceeding $1,000.00 and is liable to pay taxes to such City on such assessments upon property owned by him in said City.

2. Defendant JOHN J. HANLEY is and at all times hereinafter mentioned was the County Clerk of the County of Bronx, City and State of New York. The defendant MARIO A. PROCACCINO is the Comptroller of the City of New York.

3. Defendant HANLEY, as County Clerk of the County of Bronx, is a member of the County Jury Board of Bronx County pursuant to Section 591 of the Judiciary Law of the State of

New York. In accordance with Section 609 of the Judiciary Law of the State of New York, said County Clerk is required to make a list of persons who "are suitable to serve as grand jurors," in accordance with qualifications set forth in said Law and after he has made a "special investigation" of said prospective jurors. The Annual Grand Jury List for the County of Bronx is made up by the Bronx County Jury Board, in accordance with Section 609 of the Judiciary Law of the State of New York, from the schedule of suitable grand jurors, prepared, as aforesaid, by defendant HANLEY.

4. On information and belief, grand jurors serving in the County of Bronx have been paid and will in the future be paid by the City of New York, through vouchers and checks executed, authorized and approved by defendant, MARIO A. PROCACCINO, as Comptroller of the City of New York.

5. Section 596 of the Judiciary Law of the State of New York provides, among other things, that an individual must be (or his or her spouse must be) "the owner, in his or her own right, of real or personal property of the value of Two Hundred and Fifty Dollars" in order to qualify as a juror, in any County located in the City of New York.

6. On information and belief, defendant HANLEY, as County Clerk of the County of Bronx, in his questionnaire presented to prospective grand jurors, and in accordance with the above cited provisions of Section 596 of the Judiciary Law of the State of New York inquiries as to whether said prospective grand jurors satisfy the aforesaid property requirements. (Questionnaire, Judiciary Law Rules, Rule 17, Question 13).

7. Upon information and belief, defendant HANLEY as County Clerk of the County of the Bronx, excludes from the list of persons whom he certifies to the County Jury Board of Bronx County, from which list such Board prepares the Annual Grand Jury list, individuals who do not own property as set forth in paragraph 5 hereof.

8. The provisions of Section 596 of the Judiciary Law making the possession of property a prerequisite to qualification to serve as a grand juror in those Counites which are located within the City and State of New York, the practice of defendant HANLEY, as County Clerk of the County of Bronx, in inquiring into the property possessed by prospective grand jurors, and the practice of defendant HANLEY in failing and refusing to include in the list of persons eligible to serve as grand jurors individuals who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars deprives persons not having such property of the right to serve upon grand juries and deprives prospective defendants of liberty, "without due process of law" and denies such persons "the equal protection of the laws", by State action, in violation of the Fourteenth Amendment to the Constitution of the United States.

9. Plaintiff NATHAN STRAUS has duly made and executed a surety bond to the defendants herein in the penal sum of Two Hundred and Fifty Dollars and conditioned to pay all costs that may be awarded the defendants in this action if the Court shall finally determine the same in favor of the defendants, and said bond has been duly approved by Hon. NATHANIEL T HELMAN, Justice of the Supreme Court of the County of Bronx, Said bond has been duly filed by said NATHAN STRAUS in the Office of the Clerk of the County of Bronx.

10. As a result of the illegal exclusion from grand juries in the County of the Bronx of persons who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars, as described in the preceding paragraphs of this First Cause of Action, the entire composition of grand juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitution of the United States. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful payment of substantial amounts of money, for compensation to petit and grand jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons indicted by such illegally constituted grand juries may or will have the right to have their indictments quashed on the grounds that such grand juries were illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional grand jury and petit jury proceedings, as well as causing other considerable expenses to the City of New York.

AS AND FOR A SECOND CAUSE OF ACTION:

11. Plaintiffs repeat and reallege paragraphs 1, 2, 3, 4, 5, 6, 7, and 9 of the complaint herein with the same force and effect as if fully set forth herein.

12. The provisions of Section 596 of the Judiciary Law making the possession of property a prerequisite to qualification to serve as a grand juror in those counties which are located within the City and State of New York, and the practice of defendant HANLEY in failing and refusing to include in the list of persons eligible to serve as grand jurors individuals who(or whose spouses)

NY Const

do not own property of the value of Two Hundred and Fifty Dollars deprive persons not having such property of the right to serve upon grand juries and deprive proppective defendants of life and liberty, all "without due process of law", and deprives such persons of "the equal protection of the laws of this state," all in violation of Sections 6 and 11 of Article 1 of the Constitution of the State of New York.

13. As a result of the illegal exclusion from grand juries in the County of the Bronx of persons who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars, as described in the preceding paragraphs of this Second Cuase of Action, the entire composition of grand juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitution of the State of New York. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful expenditure and payment of substantial amounts of money, for compensation to petit and grand jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons indicted by such illegally constituted grand juries may or will have the right to have their indictements quashed on the grounds that such grand juries were illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional grand jury and petit jury proceedings, as well as other judicial expense.

AS AND FOR A THIRD CAUSE OF ACTION:

14. Plaintiff repeats and realleges paragraphs 1 to 4 inclusive and 9 of the complaint herein with the same force and effect as if fully set forth herein.

15. Defendant HANLEY, as County Clerk of the County of Bronx is required, by Section 609 of the Judicial Law of the State of New York, to "make special investigation of persons qualified to serve as trial jurors". Said defendant is further required, after make such investigation and after eliminating the names of persons convicted of felonies and of misdemeanors involving moral turpitude, to "...make a list of those persons who... are suitable to serve as grand jurors...The list shall contain the names of at least the maximum number of persons permitted for the annual grand jury list. The annual grand jury lists shall be selected therefrom by the respective county jury boards."

16. Pursuant to Rule 21 of the Rules of the Jury System in the City of New York, adopted by the justices of the Appellate Division of the Supreme Court in the first and second judicial departments, acting jointly, the annual grand jury list for the County of the Bronx is required to consist of "not less than five hundred nor more than one thousand". However, said annual grand jury list for the County of the Bronx, pursuant to Section 609 of the Judiciary Law of the State of New York, must be constituted from a list of "suitable" persons prepared by defendant HANLEY, as County Clerk of the County of the Bronx.

17. Section 596 of the Judiciary Law of the State of New York which lists qualifications for service as a juror, including as a grand juror, in any County in the City of New York, states among the requirements that "a person must...be intelligent; of sound mind and good character; well informed...", in addition to provisions requiring a juror "to be in the possession of his natural faculties" and not to have been convicted of specified types of crimes.

18. The requirements that a grand juror must be "intelligent; of sound mind and good character;" "well informed" are so vague and imprecise that they give the defendant HANLEY, as County Clerk of the Bronx, the absolute right to decide, in his sole discretion, the persons who "are suitable to serve as grand jurors" in the County of the Bronx, for the purposes of Section 609 of the Judiciary Law. Hence the above cited provisions of Section 596 of the Judiciary Law deprive persons whose qualifications are not deemed by such County Clerk to be satisfactory of the right to serve upon grand juries and therefore deprive such persons and prospective defendants of life and liberty," without due process of law" and in derogation of "the equal protection of the laws," by State action, in violation of the Fourteenth Amendment to the Constitution of the United States and deprive such persons of life and liberty, "without due process of law" and in denial of "the equal protection of the laws of this State," in violation of Sections 6 and 11 of Article 1 of the Constitution of the State of New York.

19. As a result of the arbitrary power, described in the proceeding paragraphs of this Third Cause of Action, given to defendant HANLEY, as County Clerk of the Bronx, to decide the persons who are suitable to serve on grand juries and therefore to determine the composition of the annual grand jury list, the entire composition of grand juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Fourteenth Amendment to the Constitution of the United States and Sections 6 and 11 of Article 1 of the Constitution of the State of New York. Hence the City of New York has, is

and will in the future become obligated to the illegal and wasteful expenditure and payment of substantial amounts of money, for compensation to petit and grand jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons indicted by such illegally constituted grand juries may or will have the right to have their indictments quashed on the grounds that such grand juries were illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional grand jury and petit jury proceedings, as well as other judicial expenses.

AS AND FOR A FOURTH CAUSE OF ACTION:

20. Plaintiff repeats and realleges paragraphs 1 to 4 inclusive, 9 and 16 of the complaint herein with the same force and effect as if fully set forth herein.

21. Defendant HANLEY, as County Clerk of the County of Bronx, is required by Section 609 of the Judiciary Law of the State of New York to "make special investigation of persons qualified to serve as trial jurors" and from such investigation, after eliminating the names of persons convicted of felonies and of misdemeanors involving moral turpitude, to "make a list of those persons who... are suitable to serve as grand jurors... The list shall contain the names of at least the maximum number of persons permitted for the annual grand jury list. The annual grand jury lists shall be selected therefrom by the respective county jury boards."

22. The provisions of the Fourteenth Amendment to the United States Constitution to the effect that no State shall "deprive any person of life, liberty or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" require that the lists of persons from whom grand jurors are selected constitute a reasonable cross section of the community, selected at random, without exclusion or token representation of particular economic, social or other groups, and subject only to reasonable exclusions because of occupation, competence or age, not permitting personal choice by the public officials making the actual selection of persons eligible to serve on grand jury lists or who are selected to serve as grand jurors, except on a random basis.

23. The Constitution of the State of New York provides in part as follows:

"No person shall be held to answer for a capital or otherwise infamous crime...unless on indictment of a grand jury..." (Article 1, Section 6)

"No person shall be deprived of life liberty or property without due process of law" (Article 1, Section 6)

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof." (Article 1, Section 11)

"In addition to their powers and duties as clerks of the Supreme Court, they (the clerks of counties in the City of New York) shall have power to select, draw, summon, and empanel grand and petit jurors in the manner and under the conditions now or hereafter prescribed by law...." (Article 13, Section 13 (a))

The above quoted provisions of the Constitution of the State of New York require that the list of persons from whom grand jurors are selected constitute a reasonable cross section of the community, selected at random, without exclusion of or token representation of particular economic, social or other groups, and subject only to reasonable exclusions because of occupation, competence or age, and do not permit personal choice by the public officials making the actual selection of persons eligible to serve on grand jury lists or who are selected to serve as grand jurors.

24. Section 609 of the Judiciary Law of the State of New York complies with the provisions of the United States and New York State Constitutions cited in paragraphs 22 and 23 of this complaint, only if it requires (and it must be construed so as to require) the defendant HANLEY, as County Clerk of the County of the Bronx, in making the list of persons who "are suitable to serve as grand jurors," for submission to the County Grand Jury Board, to select at random a list from the persons who meet the constitutional legal requirements for such services, which such list is drawn from a reasonable cross section of the entire population of the Bronx, without exclusion or token representation of any economic, social or other groups and without the application of arbitrary personal standards in the inclusion or exclusion of particular persons in the list of individuals, who are designated as "suitable to serve as grand jurors."

25. Upon information and belief, the defendant HANLEY, as County Clerk of the County of the Bronx, has failed and continues to fail to make an investigation to determine the names of all or a majority or even a substantial minority of those persons who "are suitable to serve as grand jurors" and who meet the legal requirements for such service in the County of the Bronx

or to make a list of such persons by selection at random, or to select a list of persons who "are suitable to serve as grand jurors", in such manner as to represent a reasonable cross section of the population of the Bronx as a whole, without exclusion or token representation of economic, social or other groups or without exclusion or inclusion of specific persons in such list, based upon application of arbitrary personal standards.

26. Upon information and belief, the defendant HANLEY, as County Clerk of the Bronx, in making his last and his current annual list of persons who are suitable to serve as grand jurors, for submission to the County Jury Board of the Bronx, included therein only the names of a select group of persons, who had previously been investigated and qualified by him, and who had served as grand jurors for many prior years, together with the names of persons who had volunteered for grand jury service. The defendant HANLEY therefore failed to meet the above cited constitutional and statutory requirements of selecting a list of persons who "are suitable to serve as grand jurors" in such manner as to represent a reasonable cross section of the population of the Bronx as a whole, without exclusion or token representation of economic, social or other groups and without exclusion or inclusion of specific persons based upon the application of arbitrary personal standards.

27. Upon information and belief, the defendant HANLEY, as County Clerk of the Bronx, in making his last and his current annual list of persons who are suitable to serve as grand jurors, for submission to the County Jury Board of the Bronx, failed to comply with the above cited constitutional and statutory requirements, in that said defendant failed to make a list selected at random from the whole population of the Bronx, with only reasonable exclusions of classes of persons or specific individuals, based upon occupation, competence or age.

28. Upon information and belief, the method, described in paragraph 26 of this complaint, which has been and is utilized by defendant HANLEY, in making a list of persons "who are suitable to serve as grand jurors" for submission to the County Jury Board of the Bronx, has led and leads, in the last past and the current annual grand jury list, to the systematic exclusion of Negroes and Puerto Ricans, except for the token inclusion of small numbers of Negroes and Puerto Ricans of upper economic and social class, and also leads to the systematic exclusion (or token inclusion) of day wage earners, indigents and young persons. The great majority of individuals, who are repeatedly and deliberately included by defendant HANLEY in the lists of those he certifies to the County Jury Board of the Bronx as being "suitable to serve as grand jurors" are white persons in the upper income brackets, who are self-employed or who hold managerial or professional positions or who have retired from such posts.

29. Upon information and belief, because of the systematic exclusion (or token inclusion) of Negroes and Puerto Ricans (except those of upper economic and social status) and of day workers, indigent and young persons from the annual grand jury lists and because of the property ownership provisions of Section 591 of the Judiciary Law of the State of New York, the present annual grand jury list and the Grand Jury panels, as presently actually extablished in Bronx County, are so constituted that there is a substantial probability that such grand jury panels will have prejudice or bias against Puerto Ricans and Negroes (except for those of upper economic and social status) and against day workers and indigent persons, in violation of the provisions of the Constitutions of the United States and of the State of New York, cited in paragraphs 22 and 23 of this complaint.

30. As a result of the unconstitutional methods employed by the defendant HANLEY, as County Clerk of the Bronx, in selecting for submission to the County Jury Board, the list of persons who "are suitable to serve as grand jurors", as such methods have been described in the preceding paragraphs of this Fourth Cause of Action, the entire composition of grand juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitutions of the United States and of the State of New York. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful expenditure and payment of substantial amounts of money, for compensation to petit and grand jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons indicted by such illegally constituted grand juries may or will have the right to have their indictments quashed on the grounds that such grand juries were illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional grand jury and petit jury proceedings, as well as other judicial expenses.

AS AND FOR A FIFTH CAUSE OF ACTION:

31. Plaintiff repeats and realleges paragraphs 1 to 4 inclusive, and 9 of this complaint as fully as if set forth herein.

32. Section 596 of the Judiciary Law of the State of New York provides, among other things, that an individual must be (or his or her spouse must be) "the owner, in his or her own right, of real or personal property of the value of Two Hundred and Fifty Dollars" in order to qualify as a juror, in any County located in the City of New York.

33. The provisions of Section 596 of the Judiciary Law, making the possession of property a prerequisite to qualification to serve as a petit juror in those Counties which are located within the City and State of New York, deprive persons not having such property of the right to serve upon petit juries and deprive prospective defendants of life and liberty, all "without due process of law" and in derogation of "the equal protection of the laws", by State action, in violation of the Fourteenth Amendment to the Constitution of the United States.

34. As a result of the illegal exclusion from petit juries in the County of the Bronx of persons who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars, as described in the preceding paragraphs of this Sixth Cause of Action, the entire composition of petit juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitution of the United States. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful payment of the substantial amounts of money, for compensation to petit jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons convicted by such illegally constituted petit juries may or will have the right to have their convictions set aside or vacated on the grounds that such juries were illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional petit jury proceedings, as well as other judicial expense.

AS AND FOR A SIXTH CAUSE OF ACTION:

35. Plaintiff repeats and realleges paragraphs 1 to 4 inclusive, 9 and 32-34 inclusive, of the complaint herein with the same force and effect as if fully set forth herein.

36. The provisions of Section 596 of the Judiciary Law making the possession of property a prerequisite to qualification to serve as a petit juror in those counties which are located within the City and State of New York, deprive persons not having such property of the right to serve upon petit juries and deprive prospective defendants of life and liberty, all "without due process of law" and deprives such persons of "the equal protection of the laws of this state," all in violation of Sections 6 and 11 of Article 1 of the Constitution of the State of New York.

37. As a result of the illega exclusion from petit juries in the County of the Bronx of persons who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars, as described in the preceding paragraphs of this Sixth Cause of Action, the entire composition of petit juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitution of the State of New York. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful expenditure and payment of substantial amounts of money, for compensation of petit jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons convicted by such illegally constituted petit juries may or will have the right to have their convictions set aside and vacated on the grounds that such petit juries were

illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional petit jury proceedings, as well as other judicial expense.

WHEREFORE, plaintiffs demand judgment as follows:

1. Against defendant HANLEY, as County Clerk of the County of Bronx, in the First, Second, Third and Fourth Causes of Action, enjoining said defendant from drawing grand jurors or from making any further lists of persons who are suitable to serve as grand jurors, in accordance with Section 609 of the Judiciary Law of the State of New York, or from taking any further action with respect to supplying replacements for the existing grand jurors, sitting within Bronx County or with respect to selecting new grand juries to sit within Bronx County, until the discontinuance of the unconstitutional and illegal procedures for selection of persons who are suitable to serve as grand jurors, as such procedures are set forth in said causes of action.

2. Against defendant HANLEY, as County Clerk of the County of the Bronx, in the Fifth and Sixth Causes of Action, enjoining said defendant from drawing any additional petit (trial) jurors, to serve on petit (trial) jury panels in the County of the Bronx until the discontinuance of the unconstitutional and illegal procedures for selection of persons as petit (trial) jurors, as such procedures are set forth in said Causes of Action.

3. In all Causes of Action, enjoining defendant PROCACCINO, as Comptroller of the City of New York, from authorizing or making any further payments for service to grand or petit jurors, until the discontinuance of the illegal and unconstitutional procedures, set forth in this complaint, for selection

of persons who are suitable to serve as grand jurors and for selection of petit jurors.

4. Together with such other and further relief as to the court may seem just and proper, together with the costs and disbursements of this action.

LANS & FINK
Attorneys for Plaintiff
Office & P.O. Address
360 Lexington Avenue
New York, N.Y.10017
OXford 7-0020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- -x

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

- -x

NOTICE

OF

APPLICATION

SIRS:

PLEASE TAKE NOTICE that, upon the summons and complaint in the above captioned proceeding, the undersigned will apply to this Court at a Special Term, Part I thereof, to be held in and for the County of Bronx in the Supreme Court Building in the Borough of Bronx, City and State of New York, on the 16th day of May 1966 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 3211 (subd. 3) of the Civil Practice Law and Rules dismissing the complaint herein on the grounds that the party asserting the cause of action has not legal capacity to sue, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, May 2, 1966.

Yours, etc.,

J. LEE RANKIN
Corporation Counsel
Attorney for Defendants
Office & P.O. Address
Municipal Building
Borough of Manhattan
New York, N.Y. 10007

EXHIBIT B

TO:

LANS & FINK, Esqs.
Attorneys for Plaintiff
360 Lexington Avenue
New York, N.Y. 10017

Hon. LOUIS J. LEFKOWITZ
Attorney General
80 Centre Street
New York, N.Y.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk
of Bronx County, and MARIO A.
PROCACCINO, Comptroller of
the City of New York,

Defendants.

MEMORANDUM OF LAW

J. LEE RANKIN

Corporation Counsel

MUNICIPAL BUILDING
NEW YORK, N. Y. 10007

jp-7

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
- x

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx
County, and MARIO A. PROCACCINO,
Comptroller of the City of New York,

Defendants.

- x

MEMORANDUM IN SUPPORT OF APPLICATION TO DISMISS THE COMPLAINT BECAUSE THE PARTY ASSERTING THE CAUSE OF ACTION DOES NOT HAVE THE LEGAL CAPACITY TO SUE AND THEREFORE FAILS TO STATE A CAUSE OF ACTION

Plaintiff seeks judgment, in this taxpayers action, (1) enjoining the County Clerk of Bronx County from drawing and the Comptroller of the City of New York from paying grand jurors and petit jurors selected in accordance with the provisions of Section 596 of the Judiciary Law and (2) declaring that the method of selection of these jurors pursuant to this provision is unconstitutional under both the Federal and State Constitutions.

ISSUES

The sole issue in this application is whether or not plaintiff has the standing to challenge the constitutionality of a State Statute.

ARGUMENT

Plaintiff's status as a citizen, resident and taxpayer of the City and State of New York does not confer sufficient standing upon him to attack the constitutionality of a State Statute. The failure to allege that a direct, substantial personal or property interest has been affected by the statute under attack is fatal.

General Municipal Law Section 51 confers upon a taxpayer the right to enjoin an illegal official act which is a violation of existing State law. It does not authorize attack upon the constitutionality of a State Law.

APPLICABLE CONSTITUTIONAL PROVISIONS

Section 1 of Amendment XIV of the Constitution of the United States provides in part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1 § 6 of the Constitution of the State of New York provides in part:

> "* * * *
> No person shall be deprived of life, liberty or property without due process of law."

Article 1 § 11 of the Constitution of the State of New York provides in part:

> "No person shall be denied equal protection of the laws of this state or any subdivision thereof."

APPLICABLE STATUTORY PROVISIONS

A

Section 51 of the General Municipal Law provides in part:

> "§51. Prosecution of officers for illegal acts.
>
> All officers, agents, commissioners and other persons acting, or who have acted, for and on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal

> corporation by any person or corporation whose assessment # # # shall amount to one thousand dollars # # #."

The Statute whose constitutionality is being challenged is Section 596 of the Judiciary Law which provides as follows:

> "§ 596. Qualifications of jurors
>
> In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:
> 1. Be a citizen of the United States, and a resident of the county.
>
> 2. Be not less than twenty-one, nor more than seventy years of age.
>
> 3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.
>
> 4. Be in the possession of his natural faculties and not infirm or decrepit.
>
> 5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.
>
> 6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.
>
> A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first

and June thirtieth next thereafter, is a resident of that county, within the meaning of this section."

POINT I

PLAINTIFF HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATE STATUTE.

(a)

GENERALLY

Plaintiff alleges that he is a resident, voter and taxpayer of the City and State of New York and as such he has a lawful interest in the proper disbursement of public funds.

Mere status as a taxpayer, citizen or resident of the City or State of New York does not confer sufficient standing upon the plaintiff to attack the constitutionality of a State statute. The constitutionality of a law may be challenged only by one who has a direct, substantial personal or property interest affected thereby. Schieffelin v. Komfort, 212 N. Y. 520 (1914); Matter of McCabe v. Voorhis, 243 N. Y. 401 (1926); Bull v. Stichman, 273 App. Div. 311, affd. without op. 298 N. Y. 516 (1948); Thompson v. Wallin, et al., 276 App. Div. 463 (1950); St.Clair v. Yonkers Raceway, Inc., 13 N Y 2d 72 (1963).

In Schieffelin v. Komfort, supra, the Court of Appeals stated at pages 529-530:

> "* * * We are of the opinion that there is no inherent power in a court of equity to set aside a statute as unconstitutional except in a controversy between litigants where it is sought to enforce rights or to enjoin, redress or punish wrongs affecting the individual life, liberty or property of one or more of the litigants. The court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected."

In Bull v. Stichman, supra, plaintiff taxpayer sought a declaratory judgment declaring that an allocation of money to Canisius College by the State Emergency Housing Board was unconstitutional in that it was a gift by the State to a religious organization. In holding that plaintiff had no standing to raise this question, the Appellate Division said at page 316:

> "From the reported decisions it clearly appears to be the established law of this state that an individual taxpayer is without capacity to maintain an action for a declaratory judgment to test the constitutionality of an act of the Legislature or the activities of State officers thereunder, unless his civil or property rights are specifically and particularly affected thereby. * * *"

In St. Clair v. Yonkers Raceway, Inc., supra, the Court of Appeals held, at page 76:

> "* * * We have always held that the

> constitutionality of a State statute may be tested only by one personally aggrieved thereby, and then only if the determination of the grievance requires the determination of constitutionality. Under that ruling an unaggrieved citizen-taxpayer, such as appellant, lacks standing to challenge the statute's constitutional validity. Appellant's contentions were rejected by this court in the case of Bull v. Stichman (298 N. Y. 516, affg. 273 App. Div. 311). * * *"

In Thompson v. Wallin, et al., supra, the plaintiff sought a declaratory judgment declaring unconstitutional Chapter 360 of the Laws of 1949 known as the Feinberg Law. The Court held at page 466:

> "It has long been a firmly settled rule of constitutional law that one may attack the constitutionality of a statute only if, when and to the extent that his rights are affected by it; that in so attacking he is not to be regarded as his brother's keeper, and may not be heard to champion any right but his own. (Town of Pierrepont v. Loveless, 72 N. Y. 211; Matter of Keeney, 194 N. Y. 281; Tyler v. Judges of Court of Registration, 179 U. S. 405; Standard Stock Food Co. v. Wright, 225 U. S. 540; Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 22; Bourjois, Inc. v. Chapman, 301 U. S. 183.) This rule is not to be lightly regarded for it stems from some fundamental principles chief among which is the doctrine of the separation of its powers. It would be usurpation of the legislative power for a court to pass upon the validity of a statute abstractly, or otherwise at the suit of one who is unaffected by it. * * *"

Plaintiff fails to allege in his complaint (presumably because he cannot) that any of his personal or property rights are affected by the legislation under attack. Thus, under the cited cases, plaintiff has no standing to seek judgment declaring the legislation invalid.

(b)

UNDER GENERAL MUNICIPAL LAW

General Municipal Law Section 51 confers upon a taxpayer the right to maintain an action against all officers, agents, commissioners or other person acting on behalf of a municipal corporation in this state to prevent any illegal waste or injury to the property of the municipality. The illegal official act which Section 51 authorizes a taxpayer to enjoin must be a violation of existing State law. If the act is in conformity to existing State law it is not illegal within the meaning of Section 51 even though such law may be unconstitutional. It was never intended that a taxpayer's action might be used as a medium of attack upon the constitutionality of a State statute.

An examination of the purpose and intent of the legislature in enacting Section 51 of the General Municipal Law will indicate the limits of its applicability. Prior to its enactment two separate and distinct common law doctrines were universally recognized in this

State. The first as expressed in Schieffelin v. Komfort, supra, (at page 533) was that:

> "The clear weight of authority in this state is against the alleged power and authority of the courts to pass upon the constitutionality of a statute except in an action or proceeding in behalf of a person whose special, peculiar personal rights are affected thereby. * * *"

The second doctrine was expressed in Altschul v. Ludwig, 216 N. Y. 459 (1916). In that case the Court held at page 464:

> "At common law a taxpayer as such has no right of action against a public officer to restrain or prevent the waste of public funds or injury to public property, or to restrain a threatened illegal official act. * * *"

Section 51 of the General Municipal Law and its predecessor statutes were enacted for the sole purpose of creating the cause of action which, at common law, did not exist in favor of a taxpayer against a municipal officer. These statutes arose out of the Tweed Scandal and the attempt to recover part of the monies looted from the City treasury. Because a taxpayer, as such, had no common law right to institute such an action, the Legislature "recognized that this condition of the law was inadequate to protect the public rights where public officials who were charged with the enforcement of the law were themselves guilty of waste or injury to public funds or property or illegal official acts." (Altschul v. Ludwig, supra, at page 464). The Altschul case outlines the legislative steps which were taken to cure this situation beginning with L. 1872, Ch. 161 and culminating in the present Section 51 of the General Municipal Law (pages 465-466).

With particular reference to the phrase "to prevent any illegal official act," the Court pointed out that the right thus newly conferred upon the taxpayer was given so as to "permit the remedy by injunction to be invoked by a taxpayer, which before was available to the attorney-general, or some body or officer acting on behalf of the public." (Rogers v. O'Brien, 153 N. Y. 357, 361 (1897).) There was no intention to confer upon a taxpayer "the power to bring actions which the public authorities have no power to bring. * * *" (Altschul v. Ludwig, supra, at pages 464-465.)

Viewed in this light it is apparent that the Legislature intended, by Section 51, to grant to a taxpayer the right to enjoin acts of municipal officers which were performed in violation of State law. But it was not the intention of the Legislature thereby to confer upon the taxpayer the right to enjoin acts permitted by State law, even though the State law might be unconstitutional.

Perhaps the clearest exposition of this limitation upon the power granted to a taxpayer by Section 51 is contained in *Meyers* v. *City of New York*, 32 Misc. 522 (Sup. Ct., N. Y. Co., 1900), affirmed on opinion below, 54 App. Div. 631 (1st Dept., 1900). In that case a taxpayer's action was brought to enjoin the City from entering into a contract for the building of a bridge across the East River. The illegality complained of was that the proposed contract incorporated the provisions of the Labor Law; that these provisions of the Labor Law were unconstitutional, and that the inclusion of these provisions in the proposed contract would result in waste of public funds. The Court squarely held that even if it were assumed that the Labor Law were unconstitutional, a contract embodying its provisions as to wages and hours of labor would not be illegal within the meaning of Section 51 (32 Misc. at p. 526). The illegality which may be attacked in a taxpayer's action (ibid.):

> "* * * can only be predicated on a contract made in *violation* of an existing law, whereas, upon the plaintiff's own showing, the defendants here proposed to enter into a contract strictly *conforming* to a certain law, by the insertion of specific provisions, which that law in terms requires shall enter into them. This is in obedience to the law, and cannot be an illegal act; it must be so, even though the law in question be unconstitutional, for it is not to be

> supposed that the Legislature, by the word 'illegal', in an act of 1892, had in mind a contract made in strict conformity to its own enactment. It would be a gross solecism to say that the Legislature could contemplate the invalidity of its own acts. The question is not whether a contract embodying provisions based on an unconstitutional law is illegal, but whether the illegality, complained of in this case, is the particular form of illegality mentioned in the statute, under which the plaintiff claims a standing in this case."

In Black v. Impellitteri, 305 N.Y. 724, the plaintiff alleged that the Mayor, Police Commissioner and Comptroller of the City of New York and District Attorney of New York County had used money of the City and County of New York to purchase and maintain wire tapping equipment, the use of which was authorized by Section 12 of Article 1 of the State Constitution and Section 813-a of the Code of Criminal Procedure. Plaintiff demanded judgment declaring those provisions of the State Constitution and the Code of Criminal Procedure relating to wire tapping unconstitutional under the Federal Constitution. The complaint did not allege that the plaintiff was specially affected by defendants' purchase and maintenance of wire tapping equipment or that he had suffered any damage thereby. A motion to dismiss the appeal was granted on the ground that no substantial constitutional question was presented, the Court citing Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512 (1949).

In Dorsey v. Stuyvesant Town Corp., supra, the Court of Appeals dismissed the plaintiff's appeal in a taxpayer's action under General Municipal Law Section 51, entitled Polier v. O'Dwyer, because his "status as a taxpayer does not support an action to challenge as unconstitutional the acts of respondent companies and officials" and therefore did "not present the constitutional question essential to our jurisdiction * * *" (at p. 521).

In Smith v. City of Buffalo, 191 Misc. 439 (Sup. Ct., Erie Co., 1948), the plaintiff brought an action under Section 51 of the General Municipal Law for judgment enjoining municipal officials of the City of Buffalo from destroying slot machines under the provisions of the Penal Law of the State of New York. Plaintiff alleged that the relevant sections of the Penal Law contravened the Federal and State Constitutions and that if the machines were destroyed pursuant to this invalid law, the City would be liable for money damages. Plaintiff's only interest in the action was that of a taxpayer. In denying her motion for a temporary injunction, the Court held at pages 444, 445:

> "As has been pointed out, the plaintiff is proceeding under Section 51 of the General Municipal Law (quoted above). Judge Chase, writing for the Court, in

> an opinion concurred in by the whole Court in the case of Schieffelin v. Komfort (212 N. Y. 520, 527), referring to Section 1925 of the Code of Civil Procedure and Section 51 of the General Municipal Law, said: 'Under the statutes quoted a plaintiff to maintain an action is not bound to show that he has suffered or is in danger of suffering an injury that is personal and peculiar to himself. The right of action is given to one who has paid a tax within one year or is assessed and liable to pay a tax and he maintains it for the purposes provided by the statutes. The right rests upon the statute and not upon the interest of the plaintiff in the subject matter in common with all other taxpayers.' It must be clearly borne in mind that this statement applies only when the illegal official act is contrary to existing enactments and not when the plaintiff seeks, by way of these statutes, to have a court of equity declare the invalidity of the enactment. * * *"

Strong support for this analysis of the scope of Section 51 of the General Municipal Law is found in the fact that the courts of the state are still without power to pass upon the constitutionality of a statute in an action directed against State officers, except where the action or proceeding is brought in behalf of a person whose special, peculiar and personal rights are affected thereby. Schieffelin v. Komfort, supra; Bull v. Stichman, supra. It does not seem likely that the Legislature intended to provide a taxpayer in a municipality, attacking the legality of a municipal official's

A

act, with an extreme method of testing the invalidity of a statute under which the officer acted, where that right is still denied to others.

Thus, regardless of the form of the action in which the attempt to declare a State law unconstitutional is made, the result is the same. As Judge Lehman wrote in Headley v. City of Rochester, 272 N. Y. 197, 204 (1936):

> "Regardless of the form of action in which relief is sought, the Courts will not declare a statute unconstitutional unless and until such relief is necessary for the protection of some right of the suitor guaranteed by the Constitution. 'The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it.' (California v. San Pablo and Tulare R. R. Co., 149 U. S. 308, 314.)"

A most recent pronouncement of this principle will be found in Bladkie v. Lindsay, N.Y.L.J. 3/28/66, Vol. 153 No. 60 p. 16 (Hecht, J.) wherein it was stated:

> "Respondents have urged dismissal of the complaint on the ground of the status of the plaintiff as a citizen, resident and taxpayer of the City and State does not confer sufficient standing to attack the constitutionality of a State statute in the absence of a showing of a direct personal or property interest of the plaintiff. This proposition is established by unassailable authority (St.Clair v. Yonkers Raceway, Inc. 13 N.Y. 2d 72, 76; Bull v. Stichman, 273 App. Div. 311, 316,

aff'd 298 N. Y. 516; *Schieffelin* v. *Komfort*, 212 N. Y. 520, 529-30; *Thompson* v. *Wallin*, 276 App. Div. 463, 466). This impediment to plaintiff's action is not removed by section 51 of the General Municipal Law (*Schieffelin* v. *Komfort*, supra; *Black* v. *Impelliteri*, 305 N. Y. 724; *Dorsey* v. *Stuyvesant Town Corp'n*, 299 N. Y. 512, 521; *Meyers* v. *City of New York*, 32 Misc. 522, 526, aff'd on opinion below, 54 App. Div. 631; *Smith* v. *City of Buffalo*, 191 Misc. 439-444-5. See also *Headley* v. *City Rochester*, 272 N. Y. 197, 204)."

A

CONCLUSION

THE MOTION OF THE DEFENDANTS TO DISMISS THE COMPLAINT SHOULD BE GRANTED

Dated: May 6 , 1966

Respectfully submitted,

J. LEE RANKIN
Corporation Counsel

IRWIN L. HERZOG
of Counsel

AT a Special Term Part I of the Supreme
Court of the State of New York, County of Bronx,
at 851 Grand Concourse, in the City of New York,
County of Bronx, State of New York on the 30th
day of June, 1966.

PRESENT: HON. Jacob Markowitz
Justice.

---x

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of
Bronx County, and MARIO A. PROCACCINO,
Comptroller of the City of New York,

Defendants.

---x

Index No.
5401/1966

ORDER TO SHOW CAUSE

Upon reading and filing the annexed affidavit of FLOYD B. McKISSICK, submitted on behalf of CORE (Congress of Racial Equality), sworn to the 20th day of June, 1966, and upon the complaint in the present action and the notice of motion to dismiss for lack of standing of the plaintiff, and upon all the papers and proceedings heretofore had herein, it is

ORDERED, that the plaintiff having consented to the intervention of CORE that the defendants, JOHN J. HANLEY and MARIO A. PROCACCINO, or their attorney, show cause before this Court at a Special Term, Part I thereof, to be held in and for the County of Bronx at the County Courthouse in the City of New York on the 7 day of July, 1966, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be granted permitting CORE to intervene as a party plaintiff in this action pursuant to Section 1013 of the CPLR: and amending the summons and complaint herein by adding the said CORE (Congress of Racial Equality) as a party plaintiff, and why CORE should not have such other and further relief as to the Court may seem just and proper; and it is further

ORDERED, that service of a certified copy of this order and of the papers upon which it is granted upon the plaintiff and defendants hereinbefore named, either personally or at the offices of their respective attorneys, on or before 3:00 P.M. of the 1st day of June, 1966, be deemed good and sufficient service; and it is further

~~ORDERED, that defendants and their attorney be and hereby are stayed from taking any other or further steps in this action until after the hearing and determination of this motion and the entry of an order thereon.~~

J.M.
JSC

Dated: New York, N.Y.
June , 1966.

E N T E R

s/ JM

J. S. C.

[Enclosed, Feinberg to Rachlin, 1966, July]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

---X

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

---X

BRIEF FOR ATTORNEY GENERAL PURSUANT TO EXECUTIVE LAW SECTION 71

The plaintiff attacks the constitutionality of Judiciary Law, §596, which requires jurors to be the owners of personal or real property, of the value of $250, in order to qualify. The Attorney General, pursuant to his statutory duty set forth in Executive Law, §71, defends the constitutionality of the requirements of the Judiciary Law.

POINT I

THE PLAINTIFF HAS NO STANDING TO BRING THIS ACTION.

Preliminarily, the Attorney General brings into question the standing of the plaintiff to bring this suit. This question should be determined at the throshold of an action for declaratory judgment. Red Robin Stores v. Rose, 274 App. Div. 462, 466-7 (1st Dept., 1948); Poe v. Ullman, 367 U.S. 497 (1961). The action is cast, at least, in part, as a taxpayer's action to prevent waste (Pars. 10, 13). Here, the plaintiff has failed to show, however, by his pleading any infringement of his "special, peculiar personal rights". He does not even allege that he falls in the category of those not eligible to serve as jurors. See Schieffelin v. Komfort, 212 N.Y. 520, 530 (1914); St. Clair v. Yonkers Raceway, Inc., 13 N.Y. 2d 72 (1963); Matter of Donahue v. Cornelius, N.Y. 2d (opinion by KEATING, J., June 1966); Matter of Blaikie, 11 A.D. 2d 196, 200 (1st Dept. 1960); Bull v. Stichman, 273 App. Div. 311 (3rd Dept. 1948); aff'd. 298 N.Y. 516, rearg. den. 300 N.Y. 460; Blaikie v. Lindsay, 153 N.Y.L.J., Mar. 28, 1966, pp. 16, 17 (Sup. Ct., N.Y. Co., HECHT, J.).

The requirement that a complainant establish standing is particularly applicable to actions for declaratory judgment or injunctive relief challenging the constitutionality of a State statute. In the classic case in this area, Schieffelin v. Komfort, supra, the Court said (at pp. 529-30):

> "We are of the opinion that there is no inherent power in a court of equity to set aside a statute as unconstitutional except in a controversy between litigants where it is sought to enforce rights or to enjoin, redress or punish wrongs affecting the individual life, liberty or property of one or more of the litigants. The court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected.
> The rights to be affected must be personal as distinguished from the rights in common with the great body of people."
> (Emphasis supplied)

In St. Clair v. Yonkers Raceway, supra, 13 N.Y. 2d at p. 76 the Court of Appeals "found anew that the rationale propounded in Doolittle v. Supervisors of Broome County (18 N.Y. 155) and Schieffelin v. Komfort (212 N.Y. 520) remains sound today." The Court went on to observe:

> "It seems to us proper 'that the courts of this state have denied the right of a citizen and taxpayer to bring before the court for review the acts of another department of government simply because he is one of many such citizens and taxpayers' (Schieffelin v. Komfort, 212 N.Y. 520, 537 supra)."

In connection with a recent Article 78 proceeding (Matter of Donahue v. Cornelius, supra) Judge Keating wrote:

> "While it is true that St. Clair involved a challenge to a legislative act, not an executive act, and that St. Clair was a proceeding for declaratory judgment, not an Article 78 proceeding, the rule of law with which we are dealing is too broad to be so easily distinguished. It is a rule of law designed to prevent the courts from giving judicial interpretations of legislative acts or executive rulings in the absence of injury or threatened injury to one's personal rights."

Federal courts, too, decline to entertain actions for declaratory judgment in the absence of proof that the plaintiff is personally aggrieved. See McCabe v. Atcheson T. & S.F. Ry. Co., 235 U.S. 151 (1914).

POINT II

THE FEDERAL CONSTITUTIONAL CONTENTION MADE BY PLAINTIFF HAS BEEN REJECTED BY THE FEDERAL COURTS.

(1)

The constitutional provisions allegedly violated are the Due Process and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States and the equal protection provisions of Sections 6 and 11 of Article I of the Constitution of the State of New York (Pars. 18, 19, 34). Basically, the plaintiff's position is that the statutes violate the constitutional requirements because they do not permit a completely "random" selection of jurors "without exclusion or token representation of particular economic, social or other groups, and subject only to reasonable exclusions because of occupation, competence or age, not permitting personal choice by the public officials making the actual selection of persons eligible to serve" (Par. 22).*

Similar contentions have been made before the United States Supreme Court in earlier cases and have been rejected. In Fay v. New York, 332 U.S. 261 (1947), the even less "random" provisions of the Judiciary Law provisions (§749-aa4) providing for the use of "blue ribbon" juries were sustained. Mr. Justice JACKSON wrote (322 U.S. at p. 272):

> "We find nothing in the standards New York has prescribed which, on its face, is prohibited by the Constitution."

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* There is not involved in this case any claim of exclusion by the statute of persons on the ground of race, creed or color.

Moreover, Mr. Justice JACKSON noted that even as to a convicted defendant, the Supreme Court "has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class". The plaintiff here does not allege that he is a member of an "excluded class".

Further, in the Fay case, Mr. Justice Jackson wrote (p. 292):

> "It would require large assumptions to say that one's present economic status, in a society as fluid as ours, determines his outlook in the trial of cases in general or of this one in particular. There is of course legitimate conflict of interest among economic groups, but they are so many and so overlie each other that not all can be significant. There is entrepreneur and wage-earner, consumer and producer, taxpayer and civil servant, foreman and laborer, white-collar worker and manual laborer. But we are not ready to assume that these differences of function degenerate into a hostility such that one cannot expect justice at the hands of occupations and groups other than his own. Were this true, an extremely rich man could rarely have a fair trial, for his class is not often found sitting on juries."

In Brown v. Allen, 344 U.S. 443 (1953), it was held that a Negro was not deprived of due process, in violation of the Fourteenth Amendment, by the method of selecting grand and petit juries from lists limited by a state (South Carolina) statute limiting jury lists to "taxpayers", even though the lists had a higher proportion of white than Negro citizens. Mr. Justice REED wrote (p. 474):

> "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty. Short of an annual census or required population registration, these tax lists offer the most comprehensive source of available names. We do not think a use, nondiscriminatory as to race, of the tax lists violates the Fourteenth Amendment, nor can we conclude on the evidence adduced that the results of the use require a conclusion of unconstitutionality. Assuming that before the Brunson case, 333 U.S. 851, there were unconstitutional exclusions of Negroes in this North Carolina county, the present record does not show such exclusions in this case. The evidence is to the contrary. The District Court correctly determined this issue as to the grand jury. As both the grand and petit juries in this case were drawn from the same filling of the jury box, the reasoning of the District Court is applicable to the petit jury here involved."

As recently as 1964, the holding in Brown v. Allen (supra) was cited with approval in Wright v. Rockefeller, 376 U.S. 52, even by one of the dissenting Justices, when

Justice DOUGLAS stated (376 U.S. at pp. 66-67):

> "We held in Akins v. Texas, 325 U.S. 398, 403, and in Brown v. Allen, 344 U.S. 443, 471, that courts in selecting juries need not--indeed should not--give each jury list the proportional racial complexion that the community has."

(2)

The decisions in Fay v. New York and Brown v. Allen (supra) have been consistently followed in cases involving both state and federal jury systems.

In Dow v. Carnegie-Illinois Steel Corp., 224 F. 2d 414 (3d Cir., 1955), the Court wrote (p. 423):

> "When the question of jury selection methods has thus been raised in a federal court the standards to be applied in determining the validity of those methods is dependent on the source of the judicial power for the solution of the particular case. In those cases coming from the state courts concerning the administration of the state jury system, the Fourteenth Amendment fixes the limits of federal action, and the issue, as it is usually stated, is whether the state has intentionally and systematically excluded any legally cognizable group from its juries. See, e.g., Fay v. New York, 1947, 332 U.S. 261, 284-285, 291, 67 S. Ct. 1613, 91 L. Ed. 2043; Pierre v. Louisiana, 1939, 306 U.S., 354, 59 S. Ct. 536, 83 L. Ed. 757; Martin v. Texas, 1906, 200 U.S. 316, 26 S. Ct. 338, 50 L. Ed 497.

In that case, the Court continued (p. 423):

> "In cases involving the jury systems of the federal courts, however, the applicable standards are not necessarily the same, for those standards depend on a different source of power. Brown v. Allen, 1953, 344 U.S. 443, 473, note 23, 73 S. Ct. 397, at page 416, 97 L. Ed. 469. There are of course constitutional provisions fixing the requirements for jury systems of the federal courts. See Article III and Amendments VI and VII of the Constitution. And in interpreting those provisions, the flexible nature of the Constitution permits the federal courts, as the Supreme Court has said, to recognize in some degree that '[o]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government.' See Glasser v. United States, supra, 315 U.S. at page 85, 62 S. Ct. at page 472. Nevertheless, when we examine the common law at the time of the adoption of the Constitution as an aid in the interpretation of those provisions, it is evident that the concepts of a property constituted jury were limited at that time. Note, 60 Harv. L. Rev. 613, 616 (1947). Consequently, instead of relying on the relevant constitutional provisions, the Supreme Court in prescribing the principles of jury selection for the federal system has chosen to utilize its supervisory power over the administration of justice in the federal courts so as 'with greater freedom to reflect * * * [its] notions of good policy.' Fay v. New York, supra, 332 U.S. at page 287, 67 S. Ct. at page 1627. * * *"

In United States v. New Jersey, 289 F. 2d 846 (3d Cir., 1961), where one of the jurymen was selected from a group obtained by telephone call by the sheriff to ten large commercial companies, Mr. Justice HASTIE cited (p. 848) Brown v. Allen (supra) and continued (p. 848):

> "Thus, within tolerable limits, a state and its officers may be selective and restrictive in the sources utilized in compiling constitutionally acceptable jury lists. Jurors may be chosen exclusively from names appearing on the local tax rolls. Brown v. Allen, supra. A State may confine jury service 'to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications'. Gibson v. State of Mississippi, 1896, 162 U.S. 565, 589, 16 S. Ct. 904, 906, 40 L. Ed. 1075. Even the New York practice of selecting 'blue ribbon' panels of prospective jurors on the basis of administratively determined special qualifications has been held constitutionally permissible where the record shows no prejudice to the accused. Fay v. People of State of New York, 1947, 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043. Even closer to the situation in the present case, the addition of names to a jury list on the suggestion and recommendation of private organizations is permissible. United States v. Dennis, 2 Cir., 1950, 183 F. 2d 201, 216-218, affirmed 1951, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137, without review of the jury issue."

He further stated (p. 848):

> "Moreover, the fact that management rather than the sheriff himself made the initial selection of the particular employees who should present themselves for jury service could be constitutionally significant only if it should appear that in the process of selecting the members of some significant group or class in the population were excluded or specially treated. It is not even contended that any such discrimination occurred in this case."

(3)

Lack of wealth carries with it certain privileges as well as burdens. Pursuant to CPLR §1101-3, a privilege to proceed as a poor person may be granted to any person who is unable to pay the costs, fees and expenses necessary to prosecute or defend an action or to maintain or respond to an appeal. The federal government has itself been able to create a classification of hospitals in the District of Columbia for the "indigent sick" as an appropriate governmental function and to retain for such a hospital its immunity from liability. Calomeris v. District of Columbia, 226 F. 2d 266 (C.A.D.C. 1955, Prettyman, C.J., Miller and Washington, JJ.) Moreover, lack of wealth has not uniformly been discarded as a reasonable basis for classification. See the federal provisions permitting the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by "a person who makes affidavit that he is unable to pay such costs or give security therefor". 28 U.S.C., §1915, which restricts even this privilege by prohibiting an appeal in forma pauperis "if the trial court certifies in writing that it is not taken in good faith".

CONCLUSION

THIS ACTION SHOULD BE DISMISSED AND JUDICIARY LAW, §596, SHOULD BE UPHELD AS CONSTITUTIONAL.

Dated: New York, New York
June 24, 1966

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pursuant to Executive Law, §71.

DANIEL M. COHEN
Assistant Attorney General
of Counsel

SUPREME COURT:STATE OF NEW YORK
COUNTY OF BRONX

NATHAN STRAUS, Plaintiff, -against- JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York, Defendants.	:	Index No. 5401/1966 **AFFIDAVIT**

STATE OF NEW YORK]
COUNTY OF NEW YORK] ss.:

AMALIA BETANZOS, being duly sworn, deposes and says:

1. I am the President of the National Association for Puerto Rican Civil Rights, a New York membership corporation, which corporation seeks leave to intervene as a party plaintiff in the above entitled action.

2. This action seeks to enjoin the defendants from drawing grand and petit jurors in Bronx County, from making any further list of persons suitable to serve as grand jurors, from taking any further action with respect to supplying any replacements for existing grand jurors, and from authorizing payments for service to grand or petit jurors serving in Bronx County until the wrongful, improper and unconstitutional procedures alleged in the complaint have been discontinued. A copy of the complaint

in the above action is attached hereto as Exhibit "A" and made a part of this affidavit. In part the complaint alleges that certain provisions of the Judiciary Law of the State of New York, relating to the designation of grand jurors, are unconstitutional as violative of the Fourteenth Amendment of the United States Constitution and Article 1 of the New York State Constitution.

The complaint further alleges that the panels from which grand jurors have been chosen in the County of Bronx are selected by defendant County Clerk in such a manner as to perpetuate grand jury service by those who have served in the past. In other words, the grand jury panels in the Bronx, instead of constituting a cross-section of the entire population of the county, selected at random, constitutes an undemocratic special group of individuals, who continue to serve at their own volition, until they die or otherwise disqualify themselves. The complaint alleges that the methods presently used by defendant Hanley in selecting grand jury panels in the Bronx violate Section 609 of the judiciary law of the State of New York, as well as Article 1, Sections 6 and 11, and Article 13, Section 13(a), of the New York State Constitution and the Fourteenth Amendment to the United States Constitution.

3. The complaint herein further contends that the wrongful, improper and unconstitutional methods used by defendant Henley in selecting grand and petit jury panels in the Bronx discriminates against particular classes and persons, particularly citizens who are of Puerto Rican descent.

4. The defendants herein, represented by the Corporation Counsel of the City of New York, have moved to dismiss the complaint on the ground that the plaintiff, who is suing as a taxpayer, alleging waste of municipal funds because of the improper methods of selecting grand jury panels in the Bronx, has failed to allege that a direct substantial personal or property interest of his has been affected by the statute under attack. (A copy of the said motion papers is attached hereto as Exhibit B).

5. The National Association for Puerto Rican Civil Rights has thousands of members of Puerto Rican descent, many of whom live in the County of Bronx. The National Association for Puerto Rican Civil Rights believes it is the largest organization whose whole purpose is the protection of the rights of citizens who are of Puerto Rican ancestory. The many members of the Association who live in the Bronx have a direct personal interest in the method of grand and petit jury selection being used in this county, since all of such members are within the class whose ability to serve as grand jurors in the Bronx is being wrongfully, improperly and unconstitutionally restricted, pursuant both to the provisions of the

judiciary Law of the State of New York which are challenged in the complaint and pursuant to the illegal and unconstitutional practices adopted by defendant County Clerk.

The Attorney General of the State of New York (who has previously been given leave to intervene in this action,) has filed a brief supporting the motion made by the defendants to dismiss the complaint on the ground that the individual plaintiff has no standing to sue.

6. We respectfully submit that the equal right of all qualified citizens to serve as grand jurors is a fundamental civil liberty. The method of grand jury panel selection used by defendant County Clerk which gives only token representation to Puerto Ricans (and members of other minority groups) cannot be permitted to survive.

7. The National Association for Puerto Rican Civil Rights is actively engaged in attempts to secure equal protection of the laws for American citizens of Puerto Rican descent.

8. The National Association for Puerto Rican Civil Rights which speaks for a large percentage of the Puerto Rican population as a whole, is often able, as we believe is the case here, to better present legal issues to the Court than an impecunious Puerto Rican defendant who has been convicted of a crime.

9. The plaintiff, Nathan Straus, has consented to the request of the present movant that it be given permission to intervene as a plaintiff in the present action. The defendants have been asked to consent to such intervention by the National Association for Puerto Rican Civil Rights but we have not as yet received their consent in this regard.

10. The National Association for Puerto Rican Civil Rights therefore requests this Court to permit it to intervene as a party plaintiff in the above entitled action. We believe that if we are permitted to intervene in this action, vital legal questions which are presented by the complaint will be considered on their merits and will not be subject to possible dismissal on technical legal grounds. We further believe that in a law suit which is of vital importance to the tens of thousands of persons of Puerto Rican descent who live in the County of Bronx, it is only proper that the largest Puerto Rican organization be permitted to intervene.

WHEREFORE, it is respectfully requested that the present motion be granted so as to permit the National Association for Puerto Rican Civil Rights to intervene as a plaintiff herein and it is further requested that the National Association for Puerto Rican Civil Rights be permitted to submit papers in opposition to defendants' motion to dismiss the complaint herein.

Amalia Betanzos

Sworn to before me this
31st day of August, 1966.

Philip Katz
Notary Public of State of N.Y.
No 41-7176950 Queens County
Term Expires, March 30 1968

file Strauss v Hanley

SUPREME COURT: STATE OF NEW YORK
COUNTY OF BRONX

- -x

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

- -x

NOTICE OF MOTION TO INTERVENE

Index No.5401/1966

SIRS:

PLEASE TAKE NOTICE, that on the annexed affidavit of Amalia Betanzos, sworn to the 31st day of August, 1966, the verified complaint herein, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Special Term, Part I, at the Courthouse thereof, on the 13th day of September, 1966, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order pursuant to §1013, Civil Practice Law and Rules, permitting the National Association for Puerto Rican Civil Rights, the movant herein, to intervene in the within action, on the ground that the movant's interest may not be adequately represented by the present parties, and directing that the said movant be added as a party plaintiff, and amending the summons and complaint herein by adding the said National Association for Puerto Rican Civil Rights as a party plaintiff, and granting to said National Association for Puerto Rican Civil Rights such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
August 31st, 1966.

Yours, &c.,

LANS & FINK, Esqs.
Attorneys for Movant
360 Lexington Avenue
New York, N.Y., 10017

TO:

J. LEE RANKIN, Esqs.
Attorney for Defendants
Corporation Counsel for the City of New York
Municipal Building
New York, New York, 10007

LOUIS J. LEFKOWITZ, Esq.
Attorney for State of New York, Intervenor
Attorney General, State of New York
80 Centre Street
New York, New York

— File Straus v Hanley

car/5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- -x

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx
County, and MARIO A. PROCACCINO,
Comptroller of the City of New York,

Defendants.

- -x

IRWIN L. HERZOG, an attorney-at-law, under penalty of perjury duly affirms.

Defendants, JOHN J. HANLEY and MARIO A. PROCACCINO oppose the applications of Floyd B. McKissick on behalf of CORE and Amalia Betanzos on behalf of the National Association for Puerto Rican Civil Rights, to intervene in this proceeding for the same reason and on the same grounds as demonstrated in defendants' motion to dismiss the complaint herein i.e., that plaintiff lacks the legal capacity to sue.

The introduction of these two new parties does not in any way correct this deficiency since the parties seeking intervention likewise lack the same legal capacity to sue.

Defendants respectfully request that the Court refer to the material submitted by them in support of their motion to dismiss the complaint that is to be argued simultaneously with the applications for intervention.

WHEREFORE, it is respectfully prayed that the applications to intervene be denied.

Dated: New York, N.Y., September 8, 1966.

IRWIN L. HERZOG

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

---------------------------------------x

NATHAN STRAUS,

Plaintiffs,

-against-

JOHN J. HANLEY, County Clerk of Bronx County and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

---------------------------------------x

AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE

Index No. 5401/1966

State of New York)
ss:
County of New York)

NATHAN STRAUS, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action. I would be happy to have Mr. McClain, who is a member of the class of persons who are being excluded from service as jurors and grand jurors, join with me as a plaintiff, and I submit this affidavit in support of his motion to intervene.

2. Vital issues are involved in this action. I do not think the technical objections based upon my personal standing should be a barrier to a court's adjudication of these vital issues.

3. The attorneys for the defendants are treating this case solely as one involving a challenge to the constitutionality of provisions of the Judiciary Law of the State of New

York. This is untrue. The major cause of action set forth in my complaint alleges that the County Clerk of Bronx County is illegally and unlawfully violating the provisions of the Judiciary Law of the State of New York in his selection of grand jurors. In any event the addition of CHARLES S. McCLAIN as a plaintiff will insure that these important issues raised by the complaint will be heard on their merits. I therefore request that CHARLES S. McCLAIN be permitted to join with me as a plaintiff in this action.

Nathan Straus

Nathan Straus

Sworn to before me this

8th day of September, 1966.

STEPHEN J. FEINBERG
NOTARY PUBLIC, STATE OF NEW YORK
No. 60-1181810
Qualified in Westchester County
Cert. filed in New York County
Commission Expires March 30, 1967

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
- -X

NATHAN STRAUS,

Plaintiff,

-against-

AFFIDAVIT

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

- -X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STEPHEN J. FEINBERG, being duly sworn, deposes and says:

1. That he is associated with LANS & FINK, the attorneys for NATHAN STRAUS, the plaintiff, and CHARLES S. McCLAIN and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS, intervenors in the above entitled action makes this application to summarize to this Court the relief requested by the plaintiffs upon this motion.

2. There are present pending before this Court four (4) motions involving the present action. Three of the motions are made by proposed intervenors directly interested in the outcome and are made with the consent of the plaintiff. The

defendants apparently object to the intervention only on the grounds that the addition of the intervenors as parties will give the plaintiffs no greater standing than is possessed by the plaintiff, NATHAN STRAUS. The standing of the plaintiffs is the subject matter of the fourth motion presently before this Court.

3. The plaintiff, however, contends that the intervention of these new interested and aggrieved parties eliminates any question as to the standing of the plaintiffs to bring this important constitutional question before this Court.

4. In this final motion to intervene, made on behalf of CHARLES S. McCLAIN, each of the intervenors also seeks permission to file a joint amended complaint so that the complaint will reflect the true state of the facts as they presently exist before the Court.

s/

STEPHEN J. FEINBERG

Sworn to before me this
12th day of September, 1966.

s/

PATTI-SUE GOULD
NOTARY PUBLIC, State of New York
No. 41-6613050
Qualified in Queens County
Commission Expires March 30, 1968

hlp 5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- - - - - - - - - - - - - - - - - - - -

NATHAN STRAUS,

Plaintiff,

-against-

AFFIRMATION

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

- - - - - - - - - - - - - - - - - - - -

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

IRWIN L. HERZOG, an attorney-at-law, under the penalty of perjury, hereby affirms:

1. I am an assistant in the Office of the Corporation Counsel of The City of New York and am fully familiar with all the facts and circumstances incident to this proceeding.

2. I make this affirmation in opposition to plaintiff's oral motion for summary judgment and in support of defendants' oral cross-motion for summary judgment made in open Court, upon mutual consent of all parties, on February 24, 1967.

3. It is respectfully prayed and it has been agreed by all parties that this motion, which is being made upon the merits of the proceeding, is to be considered only upon the prior denial of defendants' motion to dismiss, which is presently before this Court and upon the denial of the defendants' request that a determination herein be deferred

until after some action has been considered by the Legislature on the submitted amendments to Sections 596 and 662 of the Judiciary Law that are before it.

4. The Court is respectfully urged that the fact that both the City of New York through its Corporation Counsel and the State through its Attorney General have submitted amendments to the pertinent statutes is in no way an admission or concession that the present statutes are in any way illegal or unconstitutional. The mere fact that room for improvement may exist does not infer that the present status of the law is improper.

5. The methods used in the selection of jurors in Bronx County has been fully set forth in the opinion of Mr. Justice Carney in People v. Rodriguez, N.Y.L.J. 12/7/66 Vol. 156, No. 108, p. 17, a copy of which opinion has been handed up to this Court upon the arguement on February 24, 1967.

6. The various issues before the Court are as follows: (a) Does the original plaintiff, Nathan Straus, have the capacity, as a taxpayer, to challenge the constitutionality of a State statute? (b) Are the methods used by the County Clerk in selecting jurors sufficient to guarantee randomness? (c) Do any of the prospective intervenors have a capacity to sue greater than that of the original plaintiff or any capacity to sue whatsoever? And after a determinatio of these issues, if the suit is not dismissed (d) What are the merits of the situation?

7. All of the issues raised herein have been thoroughly explored and briefed by all parties and the

briefs have been submitted and are presently before the Court.

WHEREFORE, it is respectfully prayed (1) that the proceeding herein be dismissed upon the ground that neither the plaintiff nor any of the applicants to intervene have the capacity to challenge the constitutionality of a State statute, or in the alternative (2) that the proceeding be dismissed upon the merits.

Dated: March 1, 1967

IRWIN L. HERZOG

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- -X

NATHAN STRAUS,
Plaintiff,
-against-
JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, Comptroller of the City of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,
Defendants.

Index Number
5401/1966

Present Caption

- -X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- -X

NATHAN STRAUS, CHARLES S. McCLAIN, THE CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS,
Plaintiffs,
-against-
JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, et al.,
Defendants.

Proposed Amended Caption

- -X

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS PARTIES PLAINTIFF AND TO SERVE AN AMENDED COMPLAINT, AND IN ANSWER TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF STANDING TO SUE

LANS & FINK
Counselors At Law
360 Lexington Avenue
New York, N.Y., 10017

Of Counsel:

CARL RACHLIN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- x

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, Comptroller of the City of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Defendants

- x

PRESENT CAPTION
TO PROCEEDING

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- x

NATHAN STRAUS, CHARLES S. McCLAIN, THE CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS,

Plaintiffs,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, Comptroller of the City of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Defendants

- x

CAPTION TO
PROCEEDING IF
PENDING MOTIONS
TO INTERVENE AS
PARTY PLAINTIFFS
ARE GRANTED

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INTRODUCTION

Introductory Statement

In this taxpayer's action (described in more detail below) four motions are presently pending before the Court.

CHARLES S. McCLAIN, THE CONGRESS OF RACIAL EQUALITY (referred to hereinafter as "CORE") and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS (referred to hereinafter as "THE PUERTO RICAN ASSOCIATION") have moved for leave to intervene as party plaintiffs. Mr. McClain's motion further seeks permission of the Court (assuming the motions to intervene are granted) to serve and file an amended complaint on behalf of the original and intervening plaintiffs. A copy of said amended complaint is attached to Mr. McClain's motion papers, and has previously been served upon the defendants, the original plaintiff and the other prospective intervening plaintiffs. The original plaintiff and each prospective intervenor supports the other motions to intervene and the application to serve an amended complaint.

The proposed amended complaint does not state any new substantive grounds for relief. It merely alleges the standing to sue and the interest in the litigation of each of the prospective intervenors.

The defendants have moved to dismiss the complaint pursuant to Rule 3211(3) of the CPLR on the grounds that the original plaintiff "has not legal capacity to sue." The original plaintiff does not concede his lack of capacity to sue. However, granting arguendo that the original plaintiff may lack legal capacity as to certain causes of action set forth in the complaint, it is respectfully submitted that this procedural deficiency is totally overcome by the status of the prospective intervenors.

It is therefore respectfully submitted that, in the interests of justice:

1. The motions to intervene should first be heard and decided;

2. If said motions are granted, the application for leave to serve and file an amended complaint should next be heard and decided;

3. Assuming said application is granted, the prior service upon each of the defendants of a copy of the proposed amended complaint, as part of applicant McClain's

motion for leave to intervene, should be treated as service of a copy of the amended complaint upon said defendants;

4. If defendants so agree, their motion to dismiss the original complaint under Rule 3211(3) of the CPLR for lack of capacity to sue should be treated as a motion directed to the amended complaint; and

5. Each party should be given leave to submit such additional briefs as he so desires, within the time fixed by the Court.

Summary of the Complaint

A. In this taxpayer's action, plaintiff seeks to enjoin defendant JOHN J. HANLEY, as County Clerk of the Bronx, from drawing grand jurors in said County, from making lists of persons who are eligible to serve as grand jurors for certification to the County jury board, and from drawing petit jurors to serve on petit juror panels, until the discontinuance of the present allegedly illegal and unconstitutional methods (discussed below) of selecting such jurors. Plaintiff further seeks to enjoin defendant MARIO A. PROCACCINO, as Comptroller of the City of New York, from authorizing or making payments to illegally selected grand and petit jurors in Bronx County.

B. Plaintiff asserts the methods used to select grand jurors in the Bronx are illegal for the following reasons:

1. Under Section 596 of the Judiciary Law of New York, no person is eligible to serve on a jury in any county of the City unless he or she (or his or her spouse) is "the owner, in his or her own right, of real or personal property of the value of Two Hundred and Fifty Dollars." Defendant HANLEY, as County Clerk, excluded from the current and last annual grand jury lists, which he certified to the

County Jury Board of Bronx County, persons who do not own this amount of property. It is contended by plaintiff that the property requirements set forth in Section 596 of the Judiciary Law and the practice of defendant HANLEY of inquiring into the property possessed by prospective grand jurors and of refusing to include propertyless persons in the lists of eligible grand jurors, deprives such persons of the Equal Protection of the Laws, in violation of the Fourteenth Amendment to the United States Constitution and of Article I, Sections 6 and 11 of the New York State Constitution. (First and Second Causes of Action)

2. Pursuant to Section 609 of the Judiciary Law of the State of New York, the annual grand jury list for the County of the Bronx must be constituted from a list of "suitable" persons prepared by defendant HANLEY, as County Clerk. Certain of the qualifications for eligibility to serve as a grand juror, set forth in Section 596 of the Judiciary Law, are so vague and imprecise that they give the defendant HANLEY the absolute right to decide, in his sole discretion, the persons who "are suitable to serve as grand jurors" in the County of the Bronx, for the purposes of Section 609 of the Judiciary Law. For this additional reason, Section 596 of the Judiciary Law, at least as interpreted by defendant HANLEY, deprives prospective grand jurors

of the Equal Protection of the Laws, in violation of the Fourteenth Amendment to the United States Constitution, and of Article I, Sections 6 and 11, of the New York State Constitution. (Third Cause of Action)

3. Construed in compliance with the Fourteenth Amendment to the United States Constitution and Article I, Sections 6 and 11, of the State Constitution, Section 609 of the Judiciary Law requires that lists of person for inclusion on grand jury panels be prepared annually, in such a manner as to represent a reasonable cross-section of the community, selected at random, without exclusion of or mere token representation of particular economic, social or other groups. The Law further prohibits deliberate selection of particular persons for the Annual G rand Jury Lists by the county clerks who certify such lists. [We took it for granted that Section 609 must be construed in conformity to the latest Supreme Court decisions expounding the Equal Protection Clause. See Lee v. Madigan, 358 U.S. 233 (1949); Thornhill v. Alabama, 310 U S. 88 (1940); Herndon v. Lowry, 301 U.S. 242 (1937).]

Plaintiff alleges -- and will prove on trial -- that defendant HANLEY totally disregards these Constitutional and Statutory requirements in three respects. Firstly, it is contended that the last and current annual lists of persons submitted by said defendant to the County Jury Board of the Bronx systematically exclude Negroes and Puerto Ricans, except for the token inclusion of small numbers of Negroes and Puerto Ricans of upper economic and social class. Secondly, plaintiff alleges that the last and current annual lists prepared by defendant HANLEY systematically exclude (or provide only for token inclusion of) day wage earners, indigents and young persons.

In the third place, plaintiff submits that defendant HANLEY fails to follow the legal requirement that he select at random a list of persons eligible to serve as grand jurors from the total number of individuals residing in the Bronx who meet the constitutional legal requirements for such services, in that the current annual list he has certified to the County Jury Board principally consists of individuals who have previously been on grand juries or who have volunteered for such service.

These allegations are pleaded in the Fourth Cause of Action.

B. The Fifth and Sixth Causes of Action maintain that those provisions of Section 596 which make the possession of property worth Two Hundred and Fifty Dollars ($250.) a prerequisite to qualification to serve as a petit juror in the counties in New York City, transgress the Fourteenth Amendment to the United States Constitution and Sections 6 and 11 of Article I of the New York State Constitution.

PLAINTIFFS' MOTIONS

The present law suit was commenced by Nathan Straus, a citizen who pays taxes in Bronx County. Mr. Straus contends that the illegal practices pursued by defendant HANLEY in selecting grand and petit jurors in Bronx Country have resulted and will continue to result in a large waste of taxpayers' money, in that persons convicted by such illegally constituted juries will have the right to seek new trials.

Three motions to intervene as parties plaintiff are presently before the Court. Charles S. McClain seeks to intervene as a 21-year-old educated but propertyless Negro, who resides in the Bronx, on the grounds that he is personally barred from serving on grand jury panels because of his lack of affluence, because of his race, and because of his youth. Motions to intervene have also been made by The National Association for Puerto Rican Civil Rights

("The Puerto Rican Association") and The Congress of Racial Equality ("CORE"). These motions are made on behalf of large numbers of Negro and Puerto Rican members of these organizations, who it is alleged are barred from service on grand juries in the Bronx because of the discriminatory selection methods practiced by defendant HANLEY.

The defendants oppose the intervention motions made by CORE and The Puerto Rican Association but have not taken a position with respect to Mr. McClain's application.

In addition to these motions under Section 1013 of CPLR, the original and prospective additional plaintiffs seek leave to serve an amended complaint. The proposed pleading (attached to the motion papers) does not raise any new substantive issues. Its purpose is to establish the standing of the prospective additional plaintiffs to assert the issues raised in the original complaint.

DEFENDANTS' MOTIONS

The Attorney General of the State of New York has intervened, in support of defendants the Bronx County Clerk and the City Comptroller.

The original and intervening defendants have moved to dismiss the complaint on the sole ground that a taxpayer does not have the authority under Section 51 of the General Municipal Law to attack the Constitutionality of a State Statute.

This motion totally ignores the Fourth Cause of Action of the original complaint (and the amended complaint), in which the original defendants are charged with direct, deliberate and repeated violation of Section 609 of the Judiciary Law as well as of the First Amendment to the United States Constitution and the First Article of the New York State Constitution.

Defendants' motions also disregard the status of the prospective intervenors, who do not appear before this Court as taxpayers.

Applicant McClain, if his motion to intervene is granted, challenges both the methods of selecting prospective grand jurors currently employed by Defendant HANLEY and the Constitutionality of Section 596 of the Judiciary Law, on the grounds that as a propertyless Negro his Federal and State Constitutional eligibility to serve on a grand jury has been improperly blocked.

Applicants The Congress of Racial Equality and The National Association for Puerto Rican Civil Rights assert the same causes of action on behalf of their Bronx resident members, who, it is alleged, have similarly been deprived of their constitutional rights.

It is respectfully prayed that these motions to intervene be decided and granted before this Court acts on defendants' motion to dismiss the complaint on the grounds of the original plaintiff's alleged lack of standing to sue.

For the issues presented by the complaint are "of great public urgency" and should be resolved on the merits without delay created by mere procedural objections. See Heim v. McCall, 165 App. Div. 449, 150 NYS 933, 936 (1914), rev'd on other grounds, 214 N.Y. 629, 108 N.E. 1095 (1915).

THE CONTROLLING LAW

For purposes of determining the present motions, all of the facts pleaded in the complaint, of course, are deemed to have been admitted by the defendants. Equitable Life Assurance Society v. Volk, 256 A.D. 348, 10 N.Y.S. 2d 59; Felt v. Germania Life Insurance Co., 149 A.D. 14, 133 N.Y. Sup. 519. For purposes of the present motions, the complaint must, of course, be liberally construed and deemed to allege whatever may be implied from its statements of fact by fair and reasonable intendment. See Powers v. Universal Film Manufacturing Co., 162 A.D. 806, 148 N.Y.

Sup. 114; McCarthy v. Heiselman, 140 A.D. 240, 125 N.Y Sup. 13; Sweet v. Hollearn, 141 Misc. 135, 252 NY Sup. 202.

Therefore, for purposes of this motion it must be assumed that the methods used in selecting the last and current annual grand jury lists in Bronx County constitute intentional exclusion of (or mere token inclusion of) Negroes, Puerto Ricans, day wage earners, youthful individuals and indigent persons. For purposes of the present motion, it must also be assumed that the current and last annual grand jury lists of Bronx County do not represent a reasonable cross-section of the community as a whole, are not fairly reflective of the various ethnic and economic groups who reside in the County, and are constituted on the principle of perpetuating the same individuals as grand jurors rather than of rotating such service among all eligible citizens.

POINT I

DEFENDANTS' MOTION TO DISMISS FOR LACK OF STANDING TO SUE CANNOT BE DECIDED WITHOUT PRELIMINARY CONSIDERATION OF THE IMPORTANCE OF THE SUBSTANTIVE QUESTIONS ASSERTED IN THE COMPLAINT.

The defendants have moved to dismiss on the grounds that the original plaintiff has no standing to bring this suit. It is contended on pp. 16-17 inclusive of the Corporation Counsel's memorandum and on pp. 2-4 inclusive of the Attorney General's brief that a private taxpayer may not challenge the constitutionality of state legislation (and, by inference, may not question the actions of municipal officials in purported compliance therewith) unless he is directly and personally affected thereby.

The complaint charges the County Clerk of Bronx County with discriminating against Negroes, Puerto Ricans, propertyless individuals, day laborers and young persons in the preparation of lists of persons who are eligible to serve on grand and petit juries. As the original plaintiff is concededly not a member of the groups against whom discrimination has been practiced, defendants state that he has no standing to challenge these illegal practices.

In Matter of Donahue v. Cornelius, 17 N.Y. 2d 390, 397 (1966), Judge Keating called the attention of the judiciary to:

> ". . . the exception to the rule of practice under which this court on occasion decides questions which even though moot as between the parties affect the entire State or transactions of a similar character which are numerous and likely to arise with frequency . . ."

As demonstrated in this brief, the rules of law and administrative principles utilized in the composition of grand jury panels in Bronx County are widely followed throughout the state. The requirement that individuals possess property worth Two Hundred and Fifty Dollars ($250.) to serve on either a petit or a grand jury is embodied in Section 596 of the Judiciary Law which, of course, has state-wide application. If the statute and administrative practices transgress the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, then the validity of every indictment and of every conviction which takes place in this state is subject to question.

The challenge to the composition of grand juries set forth in this brief is based upon decisions of the United

States Supreme Court and of the federal Courts of Appeal rendered within the past half-decade.

Under the principle enunciated in Matter of Donahue, supra, and of the other cases listed in Point V of this memorandum, it is incumbent upon this Court to deny the motion to dismiss, if the issues asserted in the complaint "affect the entire state" or are "likely to arise with frequency."

Hence, it is submitted that this Court should consider the significance of the substantive issues asserted by the original and prospective intervening plaintiffs prior to deciding defendants' motion to dismiss the complaint under Rule 3211(a)(3) of the CPLR.

POINT II

THE PROVISIONS OF SECTION 596 OF THE JUDICIARY LAW LIMITING JURY SERVICE TO INDIVIDUALS WHO OWN PROPERTY WORTH $250 VIOLATE THE EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 11, OF THE NEW YORK STATE CONSTITUTION.

A.

Since at least 1880 the right to serve on petit and grand juries, without unreasonable discrimination, or exclusion by unreasonable classification because of personal status, has been recognized as a fundamental privilege of all citizens, which could not be abridged by the several states. Strauder v. West Virginia, 100 U.S. 303 (1880).

This protection flows from the unequivocal admonition of Section I of the Fourteenth Amendment to the United States Constitution that:

> "Nor shall any State . . . . deny to any person within its jurisdiction the equal protection of the laws."

The early decisions arising under the "Equal Protection" clause were principally concerned with prohibiting restrictions or deprivations of rights of citizenship based on color or race.

However, in its decision in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), the United States Supreme Court overruled practices which had been followed in many places since the inception of this republic and held that a State's conditioning of the right to vote on the payment of a fee or a tax was a per se violation of the Equal Protection clause.

The Court's decision reads in part:

> "We conclude that a State violates the Equal Protection clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth ..."
> Harper v. Virginia State Board of Elections, supra, at 666.

The Supreme Court went on to state that wealth or a payment of a fee could have no reasonable relationship to voting qualifications and that the use of a property factor, as a prerequisite to the exercise of a right of citizenship, was an invidious and unconstitutionally unjustifiable discrimination. On this point the Court stated, in part:

> "Wealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race (Korematsou v. U.S., 323 U.S. 214, 216) are traditionally disfavored ....
> To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of discrimination is irrelevant."
> (383 U.S. 663, at 666.)

The rule of the Harper case is a reaffirmation of the United States Supreme Court's principle that individuals may no longer be classified and given or deprived of the rights of citizenship based on their wealth, property or income. The granting or limiting of fundamental rights based on relative affluence is now totally prohibited by the Fourteenth Amendment. See Edwards v. California, 314 U.S. 160, 184-185 (Jackson J. concurring); Griffin v. Illinois, 351 U.S. 12; and Douglas v. California, 372 U.S. 353.

We submit that it can scarcely be doubted that the right to serve on a petit or grand jury is a fundamental privilege of citizenship, which no longer can be granted or denied by New York State based on an individual's wealth or lack of wealth.

B.

In the early days of this republic affluence was a well recognized basis for classifying citizens. In emulation of the anti-Democratic practices of feudal and monarchial England only persons of means were permitted to vote in elections, hold public office or exercise other important rights of citizenship.

Thus, the first New York State Constitution, enacted in 1777, restricted the suffrage to men of means. Its relevant language read:

> "VII (Qualifications of Electors)
>
> That every male inhabitant of full age, who shall have personally resided within one of the counties of this state, ... shall at such election be entitled to vote for representatives of said county in assembly; if ... he shall have been a freeholder, possessing a freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to this state."

Greater wealth was required to vote for candidates for State Senate, or to be elected to that body or as

Governor. Thus, Article X of the 1777 Constitution of New York provided:

> "...The senate of the state of New York shall consist of twenty-four freeholders, to be chosen out of the body of the freeholders, and that they be chosen by the freeholders of this state, possessed of freeholds of the value of one hundred pounds over and above all debts charged thereon........
>
> XVII "....stately, once in every three years, ... a wise and discreet freeholder of this state, shall be, by ballot, elected governor by the freeholders of this state, qualified as before-described, to elect senators."

In the years immediately following the Declaration of Independence and the American Revolution, similar restrictions applied in almost all the original states. See Charles A. Beard, Basic History of the United States, (1944) p. 209. Thus the property requirement for voting was not eliminated in New York until 1821 and not eliminated in the last of the original thirteen colonies until 1856. Beard, *supra*, at page 213.

In the early days of this country there was indeed no limit to the privileges attributed to wealth. For example, the Draft Act adopted during the Civil War provided that drafted soldiers could secure exemption from military duty by paying $300 to the federal government. 13 Stat. at Large, 733 (37th Congress, Third Session, 1863). It is now recognized that all such distinctions based on wealth are no longer morally justifiable or constitutionally permissible. Harper v. Virginia, supra.

The protection of the Bill of Rights and the Fourteenth Amendment extends to rights not specifically mentioned in the Constitution. Griswold v. Connecticut, 381 U.S. _______ (1966) (right to marital privacy); Kent v. Dulles, 357 U.S. 116 (1958) (right to travel); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to educate one's children as one chooses); NAACP v. Alabama, 357 U.S. 449 (1958) (privacy in one's associations). The Supreme Court has clearly and unmistakably held that the right to serve on a state jury, without unreasonable classification or discrimination of any sort whatsoever, is among the fundamental prerogatives of citizenship which are encompassed by the Equal Protection clause of the Fourteenth Amendment. In Hoyt v. Florida, 368 U.S. 57 (1961), the Court stated, inter alia:

> ". . . the Fourteenth Amendment . . . requires only that the jury be indiscriminately selected from among those eligible in the community for jury service, untrammeled by any arbitrary

> and systematic exclusions... We of course recognize that the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service based on race or color but also all other exclusions which single out any class of persons for different treatment not based on some reasonable classification."
>
> Hoyt v. Florida, supra, at page 59.

POINT III

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT JURY POOLS BE SELECTED SO AS TO REPRESENT A REASONABLE CROSS-SECTION OF THE ENTIRE POPULATION OF THE COMMUNITY, SELECTED AT RANDOM.

A.

As set forth on p. 17 of this Brief, freedom from arbitrary and unreasonable exclusion in the selection of persons to serve on grand jury panels has been recognized as a fundamental constitutional right for almost 100 years. Strauder v. West Virginia, 100 U.S. 303 (1880).

A series of landmark decisions in the United States Supreme Court has applied this doctrine so as to preclude state discrimination, whether embodied in statute, in court rule, or in administrative practice. Although the original cases are concerned with prejudice based on race or color, our highest court has made it clear that the mantle of the Fourteenth Amendment extends to all groups in the community.

For instance, Smith v. Texas, 311 U.S. 128 (1940) involved a Texas statute under which wide discretion in the selection of jurors was delegated to county officials. The terms of the Texas statutory scheme were fair and did not by themselves bespeak discrimination. In practice, Harris County (where the case at bar arose) had systematically excluded Negroes.

In his majority decision in finding that the County's method of applying the Texas statutory scheme was unconstitutional, Mr. Justice Black stated:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community ..."
>
> "The fact that the written words of a state's laws hold out a promise that no discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given not merely promised ..."
>
> "Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service...."
>
> "If there has been any discrimination, whether accomplished ingeniously or ingenuously the conviction cannot stand."
>
> (Smith v. Texas, supra, at pp. 130-132.)

In Hill v. State of Texas, 316 U.S. 400 (1942), Chief Justice Stone extended the doctrine of the Smith case to require Jury Commissioners to make an active effort to locate members of minority groups who are qualified to serve on juries. The Court held that the failure by administrative officials to make an affirmative effort to find members of all groups in the community who were suitable for inclusion on jury panels violated the Equal Protection clause. The Court's decision reads in part:

> "The jury commissioners ... made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors and if so who they were. They thus failed to perform their constitutional duty...Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such case discrimination necessarily results where there are qualified negroes available for jury service."

(Hill v. Texas, supra, at p. 405)

These doctrines were further extended in Cassell v. Texas, 339 U.S. 282 (1950). In that case, the Jury Commissioners followed a practice of selecting jurymen only from among people with whom they were personally acquainted, and contended that they did not personally know any eligible Negroes. The Court held that this ostrich in the sand practice was as much a form of racial discrimination as intentional exclusion. The Court concluded that it was the responsibility of the Jury Commissioners to investigate the community as a whole so as to make sure that juries fairly represent the entire eligible population.

On this point, the Court stated:

> "An individual's qualifications for grand jury service are not hard to ascertain, and with no evidence to the contrary we must assume that a large proportion of Negroes of Dallas County met the statutory requirements for jury service. Pierre v. La. 306 U.S. 354, 360. When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here and the result has been racial discrimination."

Cassell v. Texas, supra, at 288-290.

The contention that accident rather than deliberate discrimination led to the biased composition of the state's juries was dismissed by the Court, with the following realistic admonition:

> "If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose. The purpose may not be of evil intent or in conscious disregard of what is conceived to be a binding duty. Prohibited conduct may result from misconception of what duty requires."

Cassell v. Texas, supra, at p. 293.

While historically the Fourteenth Amendment may have had as a primary purpose the protection of Negroes against discrimination, it has long been held that the sheltering wings of the Equal Protection clause hovered over all groups in the community. This has been particularly true in voting rights and jury cases.

Hernandez v. Texas, 347 U.S. 475 (1954) involved a charge that the Texas jury panels discriminated against persons of Mexican descent. Reversing the position it had taken in the Smith, Hill and Cassell, supra, decisions, where it was charged with discrimination because of color, the State of Texas contended that the Fourteenth Amendment was primarily directed against discrimination due to a "two class theory", i.e. the difference between white and negro. 347 U.S. 475 at p. 482.

The Supreme Court held that the persons of Mexican descent in fact constituted a sufficiently large group of the Texas population; that their under-representation on veniers over a period of time was unconstitutionally discriminatory "whether or not it was a conscious decision on the part of any individual Jury Commissioner".

It is respectfully submitted that exactly the same principle applies to the exclusion of persons of Puerto Rican descent on New York City grand juries.

Similarily the Supreme Court held in Grey v. Sanders, 272 U.S. 368, 380 that neither homesite nor occupation "affords a permissible basis for distinguishing between (otherwise) qualified voters within a State". See also Carrington v. Rush, 380 U.S. 389.

As was recently stated by a United States District Court in Alabama:

> "This court recognizes that there is no question that any exclusion or discrimination against

> members of a particular political or economic group, race or sex, by officers in charge of selecting and summoning jurors is in contravention of the constitutional right to a jury trial and of the due process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States."

The basic requirement of the Equal Protection Clause, as applied in the composition of grand juries has been described by the United States Supreme Court as follows:

> "The American tradition of trial by jury considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community....This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups."

Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946).

B.

It is notorious that until two decades ago, grand juries in New York were principally selected by private organizations. Thus, Justice McGeehan of this Court spoke of knowing "many of the grand jurors individually after many years of intimate contact with them." In re Grand Jurors Association, 25 N.Y. Sup. 2d 154, 155 (1941). The jury list was replenished in large part from sources such as the Social Register, "Who's Who in New York," and certain university alumni directories. Cf. United States v. Flynn, 216 F. 2d 354, 379 (C.C.A. 2d, 1954).

Such practices can no longer be tolerated. The Court of Appeals has long since pointed out that under New York law a grand jury must consist "of a qualified group of men and women who represent a fair cross-section of the impartial citizens of the County." People v. Prior, 294 N.Y. 405, 413, 63 N.E. 2d 8 (1945).

In his dissenting opinion in the same case, Judge Desmond (speaking for Justices Loughran, Dye and himself) stated:

> "One of those rules written into our State Constitution and statutes is that grand jurors must be chosen by lot from the people of the vicinage, subject to challenge for lawful reasons only.

> Substantial departures from such rules invalidate a grand jury and the indictments it hands up ... Indictments so procured are not based on the 'law of the land.' " (Prior, supra, at p. 422.)

Judge Desmond's dissenting opinion of 1945 has now become the law of the land.

POINT IV

CERTAIN OF THE PROVISIONS OF SECTION 596 OF THE JUDICIARY LAW ARE SO VAGUE THAT THEY GRANT THE BRONX COUNTY CLERK UNLIMITED DISCRETION IN THE SELECTION OF JURORS, IN VIOLATION OF THE FOURTEENTH AMENDMENT

A

Defendant HANLEY, as County Clerk of the County of Bronx is required, by Section 609 of the Judicial Law of the State of New York, to "make special investigation of persons qualified to serve as trial jurors." Said defendant is further required by the Section, after making such investigation and after eliminating the names of persons convicted of felonies and of misdemeanors involving moral turpitude, to utilize the list of persons who he finds are qualified to act as trial jurors and to "make therefrom... a list of those persons who... are suitable to serve as grand jurors... The list shall contain the names of at least the maximum number of persons permitted for the annual grand jury list. The annual grand jury lists shall be selected therefrom by the respective county jury boards."

Section 596 of the Judiciary Law purportedly lists the standards to be followed by the defendant County Clerk in making such selection. Certain of these tests are reasonably precise and are unimpeachable. For example, there is a minimum age requirement; a juror is required to be literate in English and may not have been convicted of a felony or other crime implying moral turpitude.

However, Section 596 goes on to include among the requirements for eligibility to serve on a grand jury that "a person must...be intelligent; of sound mind and good character; well informed...".(Subsection 6 of Section 596). The standards set forth in Subsection 6 of Section 596 are so vague that for all practical purposes, they place unlimited discretion in defendant HANLEY (and the other County Clerks) in the selection of jurors. The Statute expressly permits defendant HANLEY to discriminate simply by using the "intelligence, character and well informed" requirements as subjective classifications.

In *Louisiana v. United States*, 380 U.S. 145 (1965) the Court sustained an order enjoining the State of Louisiana and State officials from enforcing Louisiana's "interpretation" test for voter registration as contrary to the U.S. Constitution. In 1960 The State Constitution was amended to require an applicant "to be able to understand" as well as "give a reasonable interpretation of any section of the state or federal Constitution when read to him by a registrar." Justice Black's opinion affirming the District Court's injunction stated:

> "The applicant facing a registrar in Louisiana...has been compelled to leave his voting fate to that official's uncontrolled power to determine whether the applicants' understanding of the Federal or State Constitution is satisfactory...This is not a test but a trap, sufficient to stop even the most brilliant man on his way to the voting booth. The cherished right of the people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints. See e.g. *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81. It specifically conflicts with the prohibitions against discrimination in voting because of race...to subject citizens to such an arbitrary power as Louisiana has given its

registrars under these laws."

See also Schnell v. Davis, 336 U.S. 933.

It is respectfully submitted that under the rule of Louisiana v. United States, supra, the provisions of Subsection 6 of Section 596 of the Judiciary Law constitute a *per se* violation of the Fourteenth Amendments's Equal Protection requirements, as and to the extent pleaded in the Third Cause of Action.

In addition, the Fourth Cause of Action charges defendant HANLEY with arbitrary utilization of the extraordinary discretion vested in him by Section 596, with the result of excluding Negroes, Puerto Ricans, day wage earners, indigents and young persons from the last and current annual grand jury lists in Bronx County.

In the decision of the present motions, these factual allegations of the complaint are, of course, deemed to have been conceded by the defendants. Equitable Life Assurance Society v. Volk, 256 A.D. 348, 10 N.Y.S. 2d 59.

It is respectfully submitted that New York's combination of statutory vagueness and administrative bias is constitutionally unjustifiable.*

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* The references in this point are to the original complaint. The proposed amended complaint contains almost identical allegations.

POINT V

PLAINTIFF HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 596 OF THE JUDICIARY LAW

A

Defendants, County Clerk of the Bronx and the City Comptroller, have moved to dismiss the complaint on the grounds that the original plaintiff, as a citizen Bronx County taxpayer, has no standing to challenge the constitutionality of State legislation. As pointed out above (pp.10 to 12 of this Brief), this contention, if successful, would only strike the First, Second, Third, Fifth and Sixth Causes of Action in the original (and proposed amended) complaint, which challenge the constitutionality of portions of Section 596 of the Judiciary Law. Defendants' application has no pertinency to the Fourth Cause of Action, which charges said defendants with violating certain provisions of Sections 596 and 609 of the Judiciary Law and thereby, among other things, wasting the funds of the City of New York.

The Attorney General of the State of New York, an intervening defendant, joins in the motion which has been made by defendants Comptroller and County Clerk.

B

There is no doubt that the general New York rule is that a citizen-taxpayer, who cannot show any direct or personal injury, lacks standing to challenge the constitutionality of state laws. See Schieffelin v. Komfort, 212 N.Y.520, 106 N.E. 675(1914; St. Clair v. Yonkers Raceway, Inc., 13 N.Y.2d 72(1963.)

However, a substantial number of decisions in this State have either disregarded this rule or flatly held that it was inapposite when a citizen or taxpayer sought to test the constitutionality of State legislation, involving fundamental Bill of Rights questions or which was of importance to the community as a whole.

In the earliest of these cases Sargent v. Board of Education, 177 N.Y. 317 (1904), a taxpayer brought an action to restrain the payment of public moneys to an orphanage, to be used to pay the salaries of Sisters of Charity who taught there. Use of public funds for such purpose was claimed to be in violation of the provisions of the Fourteenth Amendment to the Federal Constitution, as constituting "an establishment of religion."

The court permitted the action and passed on the merits without any discussion of the standing of a taxpayer to question the constitutionality of State action.

Ten years later a taxpayer sought to enjoin the Public Service Commission from cancelling certain contracts for the construction of the New York Subway because the contractors had employed aliens in violation of New York Labor Law §14 with which the contracts required compliance. The taxpayer contended that New York Labor Law §14, which required that only United States citizens be employed and that preference be given to citizens of New York and New York City, was unconstitutional and would cause monetary losses to the city. The trial court sustained a demurrer to the complaint finding the section constitutional. No mention was made of the plaintiff's capacity to sue. Heim v. McCall, 88 Misc. 291, 150 N.Y.S. 492 (1914). [1]

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[1] As the Appellate Division pointed out, the question of the taxpayer's lack of standing to sue was not raised by respondent Public Service Commission, but by the Court on its own. However, standing to sue may not be created by a stipulation or waiver of objection by parties or counsel. Tyler v. Judges of the Court of Registration, 179 U.S. 405; Thompson v. Wallin, 276 App. Div. 463, 95 N.Y.S. 2d 784, 788 (1950).

When the case reached the Appellate Division, which reversed on the merits, it was asserted that the taxpayer had no standing to test the validity of legislative acts under the rule in Schieffelin v. Komfort, supra. The Court held:

> "...it is represented to us that the matter is one of great public exigency, as to which all parties interested seem to desire a speedy determination, we have concluded to pass upon the appeal upon its merits."
> (165 App. Div. 449, 150 N.Y.S. 933, 936, reported sub nom. People v. Crane.)

The Court of Appeals reversed on the merits without mention of standing. 214 N.Y. 629, 108 N.E. 1095 (1915). The United States Supreme Court affirmed the decision of the Court of Appeals, and, among other things, interpreted the decision of the highest Tribunal of this State as holding that plaintiff had a right of suit. 239 U.S. 179 (1915).

In Kuhn v. Curran, 184 Misc. 788, 56 N.Y.S. 2d 737 (1944) the plaintiff taxpayer sued the Secretary of State seeking a declaratory judgment that a section of the Judiciary Law establishing ten judicial districts in place of the existing nine was unconstitutional. The trial court dismissed the action on the ground that plaintiff as a taxpayer did not have standing to bring the action.

The same plaintiff immediately commenced an Article 78 proceeding in the nature of mandamus against the Secretary of State to require him to disregard as unconstitutional the statute creating the Tenth Judicial District.

Although the mandamus proceeding would appear to fall within the ban of Schieffelin v. Komfort[1] supra -- if that rule has the general application which the present defendants contend -- the trial court held that the plaintiff had standing to sue for an "injunctive mandamus" in view of the importance of the question involved.

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[1] See Matter of Donahue, 17 N.Y. 2d 390

The decision stated in part:

> "An important public question is raised. It requires an adjudication well in advance of the election and of the preliminary steps for the election. In some what similar circumstances mandamus has been treated as the appropriate remedy. Matter of Reynolds, 202 N.Y. 430, 442, 96 N.E., 87, 89. See also Matter of McCabe v. Voorhis, 243 N.Y. 401, 153 N.E. 849; Matter of Koenig v. Flynn, 258 N.Y. 292, 179 N.E. 705, Matter of Andresen v. Rice, 277 N.Y. 271, 14 N.E. 2d 65." Kuhn v. Curran, 183 Misc. 942, 53 N.Y.S. 2d 30, 31 (1945).

A direct appeal was taken to the Court of Appeals which made short shrift of the issue as to the plaintiffs' alleged lack of standing:

> "In view of the importance to the public of an authoritative determination of...[the] question at the present time, we do not pause to consider whether the question is presented in appropriate proceedings." Kuhn, supra, 294 N.Y. 207, 213, 61 N.E. 2d 513, 515 (1945)

In Lederman v. Board of Education of the City of New York, 196 Misc. 873, 95 N.Y.S. 2d 114 (1949), plaintiffs were a heterogeneous group of the Teachers Union, other unions, parents, parent-teacher associations, citizens, a social worker, the head of a religious group, teachers and taxpayers. This group of plaintiffs commenced an action for a permanent injunction and a judgment declaring unconstitutional a State statute providing for elimination of subversive persons from the public school system.

The Corporation Counsel of the City of New York, then as in the instant case, asserted that the taxpayers had no standing to challenge the constitutionality of the statute. The Court rejected this view, stating in part:

> "The right of the taxpayer plaintiffs presents a different proposition. Section 51 of the General Municipal Law permits a taxpayer to sue to prevent "any illegal * * * act * * * or * * * waste or injury to, * * * property, funds or estate of * * * municipal corporation. Defendant comes within the scope of this section in so far at least as to authorize an action by a taxpayer to prevent waste of the city's money. Lewis v. Board of Education of New York City, 258 N.Y. 117, 120, 179 N.E. 315, 316..." (95 N.Y.S. 2d 114, at p.118.)
>
> "In view of the foregoing the Court holds that plaintiff taxpayers have the right to sue. In any event, it being vitally important to the public at large and the school system in particular that the real issue herein be speedily determined, the Court should not 'pause to consider whether the question is presented in appropriate proceedings' Matter of Kuhn v. Curran, 294 N.Y. 207, 213, 61 N.E.2d 513, 515." (Lederman, supra, 95 N.Y.S. 2d 114, 118)

The trial court found that the challenged statute was unconstitutional.

The Lederman case was reversed by the Appellate Division on appeal on the merits without any question being raised as to the plaintiff's capacity to sue. 276 App. Div. 527, 96 N.Y.S. 2d 466 (1950).

In the Court of Appeals, the Lederman case was combined with two other suits, also challenging the constitutionality of the Feinberg law. The Court of Appeals affirmed the identical judgments which the Appellate Division had rendered in all three cases, upholding the validity of the challenged legislation. Like the Appellate Division, the Court of Appeals did not question the status of plaintiffs as taxpayers and civil groups (as representatives of taxpayers) to commence litigation for the purpose of ascertaining whether or not a statute of great public importance was constitutional.

It should further be noted that certiorari was granted by the United States Supreme Court for the purpose of reviewing the decision of the Court of Appeals. In its own decision (342 U.S. 485) the United States Supreme Court again assumed that, under New York law, which concededly controlled the procedural aspects of the case, taxpayers and citizens' groups had standing to question the constitutionality of State legislation, which allegedly infringed rights protected by the Fourteenth Amendment.

In Peters v. New York City Housing Authority, 128 N.Y.S. 2d 224 (1954) plaintiff sought a declaration invalidating a Housing Authority Resolution requiring as a condition of occupancy in federally aided projects that the applicant or tenant sign a certificate of non-membership in subversive organizations. Counsel for the New York City Housing Authority sought to dismiss the proceeding (brought on under Article 78 of the former Civil Practice Act), on the ground that plaintiff,not being a member of any subversive organizations, had no personal interest in the outcome of the litigation and therefore had no standing to sue.

The Court overruled the preliminary procedural objection, stating in part:

> "Moreover, since the case presents issues of vital concern and importance to the community generally, the court should disregard these purely technical objections and should resolve the main and basic questions raised by the petitions. Matter of Kuhn v. Curran, 294 N.Y. 207 , 213, 61 N.E. 2d 513, 515." Peters, supra, at 233.

(The decision of the Trial Court was modified on substantive grounds by the Appellate Division, whose decision in turn was reversed by the Court of Appeals. The question of standing was not mentioned in either of the opinions above, and both appellate courts appear to have assumed that plaintiffs had standing to sue. 283 App. Div. 801, 128 N.Y.S. 2d 712, 307 N.Y. 519, 212 N.E. 2d 529 (1954).)

In Strippoli v. Bickal, 248 N.Y.S.2d 588 (1964) individual parents of white pupils commenced an injunction against school officials to prevent the transfer of non-white pupils to schools which had previously not been integrated. Respondents sought to dismiss the proceeding on the technical ground that petitioners were not persons "aggrieved" or "affected by" or "interested in" the action of the Board of Education. This preliminary motion was denied by the Court, which cited the traditional judicial practice of displaying "extreme liberality" in allowing parties to commence proceedings which involved subjects of considerable public importance, requiring interpretations of statutes and constitutional provisions. (Strippoli, supra, at p. 596.)

Matter of Andresen v. Rice, 277 N.Y. 271, 14 N.E. 2d 65 (1938) was a proceeding to compel State Officials to perform duties provided by the Civil Service Law relative to Police examinations. A motion to dismiss because of lack of standing to sue was pleaded. The Court of Appeals held that this plea in abatement had no merit and should be disregarded. On this presently relevant point, the Court's decision read in part as follows:

> "The point has been raised that the petitioner here is not capable of presenting this matter to the court, as he has not applied for a position on the force. He is of age to make such application, but, more than that, he is a citizen and resident of the state of New York, and, being such, is

> capable of presenting to the courts his petition for the enforcement by officials of their mandatory duties (cases cited)." (277 N.Y. 271, at 281.)

See to similar effect Matter of Board of Education v. Wilson, 282 App. Div. 821, appeal denied, 306 N.Y. 983 (1953); Matter of Libby et al v. Angevine et al, 17 Misc. 2d 80, 182 N.Y.S. 2d 495 (1959), aff'd., 8 App. Div. 2d 474, 188 N.Y.S. 2d 364; Matter of McDonough v. Board of Education, 20 Misc. 2d 98, 189 N.Y.S. 2d 401 (1959); Application of Vetere v. Allen, 41 Misc. 2d 200, 245 N.Y.S. 2d 682 (1963).

C.

The policy of the New York judges has been raised to the level of constitutional protection by the United States Supreme Court, which has held that almost any citizen has a right to raise a fundamental Bill of Rights question even if he is not personally affected by the precise issue.

Thus, in Barrows v. Jackson, 346 U.S. 249 (1953), the defendant, a white co-covenantor of a restrictive covenant against the sale of realty to non-Caucasians, was allowed to assert the rights of the Negroes who were not parties, against the enforcement of the covenant by the state court. The objection of defendants' lack of personal standing to object was dismissed with the following language:

> "In the instant case . . . it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighted by the need to protect the fundamental rights which would be denied . . ." (Barrows, supra, at 257.)

Substantially, the same situation prevails in the instant case. The impoverished and often jobless Negroes and Puerto Ricans, who are the prime targets of discrimination in selection of the Bronx County grand juries, would, as a practical matter, find it difficult, if not impossible, to assert their grivances. For they lack both the funds and the knowledge with which to commence litigation on their own behalf.

Moreover, for persons who are living on welfare payments, to challenge the actions of anothe[illegible]al department would be an act of almost incredible teme[illegible]y. Under the circumstances, plaintiff Straus has a clear right to assert the grievances of his forcibly inarticulate fellow citizens.

See to similar effect: Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 239 U.S. 33 (1915); Zorach v. Clauson, 343 U.S. 306 (1952); Engel v. Vitale, 307 U.S. 421 (1962); School District, etc. v. Schemipp, 374 U.S 203 (1963).

D.

It is contended on pages 6 - 17 of the Corporation Counsel's Memorandum and on pages 2 - 4 of the Attorney General's Brief that private taxpayers may not challenge the constitutionality of State legislation unless they are directly and personally affected thereby.

The "rule" to which the defendants refer has its origin not in statute, but in judge-made restrictions.

The preceding portions of this Point demonstrate that the New York courts have repeatedly overruled their own "rule" in cases of public importance.

Judge Keating of the Court of Appeals in Matter of Donahue v. Cornelius, 17 N Y. 2d 390, 397 (1966) referred to:

> ". . . the exception to the rule of practice under which this court on occasion decides questions which even though moot as between the parties affect the entire State or transactions of a similar character which are numerous and likely to arise with frequency ..."*

It is hard to conceive a case of greater public importance and involving issues more likely to erupt in constant litigation than those which are set forth in the present complaint. Based upon United States Supreme Court decisions principally decided within the last five years, the present plaintiff contends that the property requirements and certain other aspects of the present procedures for selecting grand and petit jurors in the Bronx violate the Fourteenth Amendment to the United States Constitution. The same practices prevail, under Sections 596 and 609 of the Judiciary Law, in the other counties in New York City, and in most of the other counties in this state. If plaintiff's factual allegations are correct (and it must be so assumed for purposes of the present motions), plaintiff has made a prima facie showing that, in addition to the provisions of the Judiciary Law which infringed the Fourteenth Amendment, the actual methods of selection of jurors used in Bronx County, are unconstitutional.*

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* In the Donahue case, itself, Judge Keating held the rule inapplicable. That proceeding was an application to annul an article of the New York State Police Regulations and a promotion examination for Sergeant based thereon. Petitioner had passed the examination and had no personal grievance. The Court held the issue was not of public importance.

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* For example, a study conducted under the auspices of Professor Joseph McGoldrick of Queens College (a former Comptroller of the City of New York) in 1963 showed: 100% of the jurors in the sample were white, although 8.5% of the County is non-white; 76.5% of jurors in the sample were engaged in managerial or professional work as opposed to 25.8% in the county; 67.8% of jurors in the sample earned more than $10,000 per year compared with 52.4% of the population in the county earning between $3000-$6999. Similarly, a 1964 random sampling of grand jurors in Nassau County showed, among many other things, that 88.5% of the jury list was composed of professional, technical, managerial and proprietary persons as opposed to only 31.4% of the county in this category. See Columbia Journal of Law and Social Problems for June 1966, page 92.

The discriminatory pattern of grand jury selection in the Bronx (and the rest of the state), sanctioned by Section 596 of the Judiciary Law and augmented by the actual practices of County Clerks, including the defendant HANLEY, has the greatest impact upon impoverished Negroes and Puerto Ricans.

However, the persons against whom discrimination is directly practiced are legally unable to challenge the shackles which are imposed upon them. For under Section 51 of the General Municipal Law, a taxpayer's action may only be commenced by a person who owns real property assessed at at least $1,000. Since Section 596 of the Judiciary Law contains a $250 property requirement for qualification as a juror, no one who has the $1,000 required to bring a suit under Gen. Mun. L. §51 could be a "person excluded and aggrieved" under Judic. L. §596. (In Donahue v. Cornelius, supra, Judge Keating of the Court of Appeals implied that the limitations applied to a taxpayer's suit also pertained to Article 78 proceedings.)

If the Courts adopted the position of the

Corporation Counsel and New York State Attorney General, only convicted criminals could question the New York jury selection procedures.

There is presently widespread doubt as to the constitutionality of the property requirements of Section 596 of the Judiciary Law and of the methods used by the county clerks in constituting grand jury panels. Unless these issues are authoritatively determined, it is reasonable to assume that many literate convicts will seek to set aside their convictions on self-drawn writs of coram nobis. Similarly, it must be assumed that a large number of newly convicted individuals will appeal their convictions on the grounds that they were indicted by illegally constituted grand juries and tried by equally illegally constituted petit juries. Uncertainty and confusion will arise as to whether and to what extent previously convicted (and often guilty) criminals will be freed because of procedural defects in their trials. Enormous waste of municipal funds and of the time of the courts will result because of the necessity for re-indicting and re-trying individuals, if it should subsequent be decided, in their own appeals, that their indictments and trials were improper because of the methods by which juries were constituted.

The public interest in the orderly administration of justice requires speedy adjudication as to the propriety of the methods presently used in New York for selecting grand jury panels in light of the most recent decisions of the United States Supreme Court. The major social advantage of deciding this issue, in a proceeding which is not the appeal of a convicted criminal, is that it will permit the establishment of a new rule for jury selection upon a purely prospective basis, without the retroactive effect of opening the doors to half the prison cells in the state. Cf. Johnson v. New Jersey, 16 L.Ed. (2) 882, U.S. (1966); Linkletter v. Walker, 381 U.S. 618 (1965); Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940).

> "The accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective... There seems to be no impediment -- constitutional or philosophical -- to the use of the... rule in the constitutional area where the exigencies of the situation require such an application..." (Linkletter, supra, at pp.628-9.)

POINT VI

THE MOTIONS TO INTERVENE SHOULD BE GRANTED

A.

By notice of motion dated September 8, 1966, CHARLES S. McCLAIN seeks to intervene in the present action on the grounds that he is personally aggrieved by the wrongful and illegal acts alleged in the complaint and that his interests may not be adequately represented by the present parties.

In a supporting affidavit verified September 8, 1966, Mr. McCLAIN alleges that he is twenty-one years old, a Negro, and that he owns only One Hundred Dollars ($100.) worth of property.

Mr. McCLAIN is a member of the very class of individuals which is barred from membership on petit and grand jury panels in New York State. The fact that he has less than Two Hundred Fifty Dollars ($250.) worth of property precludes Mr. McCLAIN from eligibility for jury service under the capital requirements of Section 596 of the Judiciary Law, as challenged in the First, Second, Fifth and

Sixth Causes of Action. In addition, McCLAIN belongs to those groups in the community whom Defendant HANLEY, in the Third and Fourth Causes of Action, is charged with excluding from grand jury panels as a matter of policy.

The motion to dismiss made by defendants is predicated, among other things, upon the contention that the original plaintiff, NATHAN STRAUS, does not belong to the classes which allegedly are improperly excluded from jury service. Mr. McCLAIN is a member of several of the allegedly excluded minority groups; i.e., he is an impecunious, unemployed young Negro.

Therefore, it is respectfully submitted that CHARLES S. McCLAIN's motion to intervene should be granted, pursuant to Section 1013 CPLR.*

B.

By order to show cause signed by Mr. Justice Markowitz on June 30, 1966, the Congress of Racial Equality ("CORE") seeks to intervene as a party plaintiff in the present action pursuant to Section 1013 of the CPLR.

CORE is a nation-wise Negro civil rights organization, having many hundreds of members in Bronx County. The moving affidavit of CORE's national director, FLOYD B. McKISSICK, sworn to June 20, 1966, alleges in paragraph 5 that many of the organization's Bronx members "are being prejudiced because they are not being qualified for grand jury service." It is alleged that such failure results from "wrongful, improper, and unconstitutional" discrimination against Negroes, including CORE's members (paragraph 3 of moving affidavit).

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* The original plaintiff has consented to all three motions to intervene.

By notice of motion dated August 31, 1966, The National Association for Puerto Rican Civil Rights has also sought to intervene as a party plaintiff in the present action.

The affidavit of Amalia Betanzos, President of the Puerto Rican Association, sworn to August 31, 1966, alleges in part as follows:

> "The National Association for Puerto Rican Civil Rights has thousands of members of Puerto Rican descent, many of whom live in the County of Bronx. The National Association for Puerto Rican Civil Rights believes it is the largest organization whose whole purpose is the protection of the rights of citizens

> who are of Puerto Rican ancestry. The many members of the Association who live in the Bronx have a direct personal interest in the method of grand and petit jury selection being used in this county, since all of such members are within the class whose ability to serve as grand jurors in the Bronx is being wrongfully, improperly and unconstitutionally restricted, pursuant both to the provisions of the Judiciary Law of the State of New York which are challenged in the complaint and pursuant to the illegal and unconstitutional practices adopted by defendant County Clerk." (Paragraph 5).
>
> "The National Association for Puerto Rican Civil Rights which speaks for a large percentage of the Puerto Rican population as a whole, is often able, as we believe is the case here, to better present legal issues to the Court than an impecunious Puerto Rican defendant who has been convicted of a crime." (Paragraph 8).
>
> "We believe that if we are permitted to intervene in this action, vital legal questions which are presented by the complaint will be considered on their merits and will not be subject to possible dismissal on technical legal grounds. We further believe that in a law suit which is of vital importance to the tens of thousands of persons of Puerto Rican

> descent who live in the County of Bronx, it is only proper that the largest Puerto Rican organization be permitted to intervene." (Paragraph 10.)

C.

In considering the CORE and Puerto Rican Association applications for leave to intervene, it is respectfully suggested that the rule of law is that stated by Mr. Justice Jackson of the United States Supreme Court in Cassell v. Texas, 339 U.S. 282 (1949):

> "I suppose there is no doubt, and if there is this court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or class action for an injunction or a mandamus against the state officers responsible. Cf. Hague v. Committee of Industrial Organizations, 307 U.S. 496; Douglas v. Jeannette, 319 U.S. 157; Morris v. Williams, 149 F. 2d 703; Myerson v. Samuel, 74 F. Supp. 315; Roles v. School Board, 61 F. Supp. 395." (Cassell, supra, at p.   .)

POINT VII

DEFENDANT ATTORNEY GENERAL FAILS TO SHOW THAT THE PRACTICES EMPLOYED IN THE COMPOSITION OF GRAND JURY POOLS IN NEW YORK STATE COMPLY WITH THE FOURTEENTH AMENDMENT.

Point II of Defendant Attorney General's brief alleges that the methods used for selecting grand jurors in Bronx County, and the requirement that all jurors must own property worth at least Two Hundred and Fifty Dollars ($250.), do not violate the Fourteenth Amendment. The fallacies in the State's position are readily demonstrable.

To start with, the Attorney General misdescribes the complaint with the statement that, "There is not involved in this case any claim of exclusion by the statute of persons on the ground of race, creed or color." (Page 5) Indeed, no claim is made that the New York State statutes discriminate because of race or color. However, the Fourth Cause of Action expressly charges defendant County Clerk of the Bronx with, among other things, systematic exclusion (or mere token inclusion) of Negroes and Puerto Ricans on the last and annual grand jury list in the Bronx. Of course, it has long been established that the discrimination against racial (or other) minorities in jury service by administrative practice is as much a violation of the Fourteenth Amendment as discrimination created by direct statutory language. Neal v. Delaware, 103 U.S. 370; Norris v. Alabama, 394 U.S. 587 (1935); Smith v. Texas, 311 U.S. 128; Hill v. Texas, 316 U.S. 400.

Secondly, the Attorney General's brief completely ignores the First, Second, Fifth and Sixth Causes of Action, in which it is contended that the provisions of Section 596 of the Judiciary Law, making the possession of property a prerequisite to service on any jury in this city, are per se violations of the Equal Protection clause.

In the third place, the State misdescribes the basic position taken by plaintiff in the Fourth Cause of Action, with the reductio ad absurdum contention that it construes the Constitution as requiring "a completely random selection of jurors." The gravamen of the Fourth Cause of Action is that the Bronx County Clerk makes a completely arbitrary selection of persons to serve on the annual grand jury list, that he perpetuates the same persons as grand jurors, and that he deliberately fails to constitute panels which are representative of the entire population of the County as a whole.

In the fourth place, the cases cited by the Attorney General to defend the Bronx County's (and New York State's) pattern of discrimination in jury selection, are all either outmoded or irrelevant. This defendant's key case is the 1947 decision in Fay v. New York, 332 U.S. 261, sustaining against a constitutional challenge the "blue ribbon" jury provisions of Section 749-aa4 of the Judiciary Law. It would be almost equally appropriate to cite the Dred Scott case as establishing the constitutional inviolability of slavery. In light of the more recent pronouncements of the United States Supreme Court, referred to on pages 17 to 32 of this brief, it can scarcely be doubted that the Fay decision no longer constitutes ruling law. Under current decisions, the Fourteenth Amendment is violated by any method (statutory or administrative) for creating grand jury panels which does not fairly reflect the overall population of a county and which establishes a grand jury pool on a basis grossly disproportionate to the rational, ethnic and occupational composition of the community as a whole. The constitutional requirement is not that each individual has a right to serve on a grand jury, but that each group in the community must have representation in the grand jury pool fairly representative of that group's proportion of the entire population. See United States ex. rel. Seals v. Wiman, 304 Fed.2d 53 (C.C.A. 5th 1962)

The Attorney General inaptly cites Brown v. Allen, 344 U.S. 443 (1953) as allegedly holding that jury lists may be restricted to "taxpayers," by state statute, although this obviously results in selection of jurors on an economic basis.

The trouble with New York State's position is that appellants in Brown v. Allen (unlike the plaintiff herein who raises the issue in the complaint)did not assert economic bias as an objection to the North Carolina jury system until after the petition for certiorari was granted. Accordingly, the Supreme Court held that the issue of whether jury service can constitutionally be restricted to taxpayers or men of property had not been timely raised and could not be asserted in that particular case. On this point the Court stated:

> "Since the effect of this possible objection to the selection of jurors on an economic basis was not raised or developed at the trial, on appeal... on the former certiorari to this court, or in the petition or brief on the present certiorari to this court, it is not open to consideration here...

> "The action of the Commissioner's clerk... in selecting those with 'the most property' an economic basis not attacked here, might well account for the few Negroes appearing in the box." (Brown v. Allen, supra, at p. 480.)

The Attorney General further cites Brown v. Allen for the proposition that it is constitutionally permissible to discriminate against Negroes by the use of an arbitrary classification technique not explicitly related to race or color. This was not the Court's holding. The Brown case involved a factual determination after a trial that the local administrators did not discriminate against Negroes in selecting grand and petit juries. The United States Supreme Court recited that the North Carolina clerk's jury selections were "unchallenged" and that "there is no evidence of racial discrimination " (344 U.S. 443, 482).

In the instant situation, the Fourth Cause of Action charges the defendant County Clerk with discrimination. We have the greatest respect for the Attorney General of this state, but do not see how he can decide ex cathedra, in advance of a trial, that there is no discrimination in the selection of jurors in Bronx County.

The Fourth Cause of Action in the complaint alleges that the recent past and current Annual Grand Jury Lists in the Bronx provide only token inclusion of a very few Negroes and Puerto Ricans. Such mere token inclusion (conceded for purposes of this motion) creates a prima facie case of unconstitutional discrimination, which the state has the burden of rebutting (Patton v. State of Mississippi, 332 U.S. 463 (1947) .

Brown v. Allen (upon which New York State relies in defense of its practices) states categorically: "Of course token summoning of Negroes for jury service does not comply with equal protection" (344 U.S. 443).

If New York State is now attempting to place a dollar sign on the Fourteenth Amendment by saying that it is proper to restrict jury service to men of property, this position is no longer tenable in light of the United States Supreme Court's decisions in Hoyt v. Florida, 368 U.S. 57

(1961) and Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).

The third United States Supreme Court case cited by the State in defending the Bronx County grand jury practices is Wright v. Rockefeller, 376 U.S. 52. Wright is quoted for the proposition (in one of the dissenting opinions) that the courts are not required in selecting juries to follow the precise proportional racial complexity of each community. This correct proposition has nothing to do with the issues in the present case. The gravamen of the Fourth Cause of Action is that defendant HANLEY systematically excludes, or makes only token inclusion of, Negroes, Puerto Ricans and other minority groups in compiling the Bronx County grand jury lists. This type of pattern discrimination is expressly prohibited by the Wright case and by the other recent decisions cited on pages 74 to 76 of this brief.

The State also cites the decisions of the Third Circuit Court of Appeals in Dow v. Carnegie-Illinois Steel Corp., 224 F. 2d 414 (1955) and in United States v. New Jersey, 289 F. 2d 846 (1961). These decisions are by their terms based in part upon "the common law at the time of the adoption of the Constitution" (224 F. 2d 414, 423) and support the proposition that states may restrict juries to taxpayers and owners of real property.

With all due respect, however, since the United States Supreme Court's decision in Harper v. Virginia State Board of Elections, supra, it is clear the Fourteenth Amendment prohibits the states from restricting jury service to taxpayers or property holders.

Unbelievably, the Attorney General further seeks to sustain the constitutionality of the property requirements embodied in Section 596 of the Judiciary Law with the contention that, "Lack of wealth carries with it certain privileges as well as burdens." (Page 11 of defendant LEFKOWITZ's brief.) Shades of King George III!

The State correctly states that impoverished individuals are entitled to sue, without obligation to pay costs or security, in forma pauperis. It alleges that all governments provide free hospital service "for the indigent sick."

We think the Court will agree that these analogies are irrelevant. The fact that indigent individuals are given certain types of financial assistance by the government does not mean that they are deprived of their rights of citizenship. No one asked the prospective intervenor McClain to empty out his wallet or produce his bank balances when he was drafted into the Army of the United States. By the same token, and in 1967, neither New York nor any other state can deny Mr. McClain or any other indigent individual the right to serve on a jury, by virtue of his lack of property.

B.

Defendants are apparently relying upon outmoded decisions of the United States Supreme Court to refute our contentions that (a) possession of property may no longer be made a prerequisite for jury service, and (b) the overall pool or panel from which grand jurors are selected must be fairly representative of the entire composition of the community and must not exclude or unduly minimize the representation of specific economic or ethnic groups.

In order to preserve the symmetry of the judicial system, the United States Supreme Court rarely expressly reverses its own prior decisions. It is therefore technically possible to say that the 1896 opinion in Gibson v.

State of Mississippi, 162 U.S. 565, providing that a state may confine jury service "to freeholders" is still good law, for the statute as such has never been held unconstitutional.*

It is, however, the obligation of the courts of this state to follow the interpretations of the United States Constitution which are currently being rendered by the Supreme Court. The recent rulings cited in this brief all strike the dollar sign, like the race and occupational barriers, from the lists of constitutionally permissible prerequisites to jury service, voting, or similar fundamental rights. As was stated in a similar situation, ". . . our highest court has adopted a new ruling . . . and such new ruling, being in effect a reversal of its earlier decision, is both controlling and compelling on this court in the instant application." Kelly-Sullivan, Inc. v. Moss, 174 Misc. 1098, 22 NYS 2d 491, at 500 (1940); Abbye Employment Agency, Inc. v. Robinson, 166 Misc. 820, 2 NYS 2d 947, at 950-951 (1938).

The rule that the constitutionality of legislation must be determined in light of the most recent United States Supreme Court decisions has particular application in cases involving the Bill of Rights. See United States v. Carolene Products Co., 304 U.S. 144, 152-3.

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* However, even Mississippi has repealed that discriminatory statute. See Harper v. State, 171 So.2d 129, 133 (1966).

CONCLUSION

Twenty-one years ago, the United States Supreme Court stated:

> "The American tradition of trial by jury considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community ... This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of our jury system. To disregard it is to open the door to class distinctions which are abhorrent to the democratic ideals of trial by jury."

Thiel v. So. Pacific Co., 328 U.S. 217, 220 (1946).

In the same year, the Supreme Court stated that the systematic exclusion of a racial group, or social or economic class from jury service not only harmed a particular defendant, but worked unjustifiable "...injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." Ballard v. U.S. 329 U.S. 187, 195 (1946).

At long last, these principles have been asserted and enforced, even in the courts of the deep South. In Harper v. State, 171 So. 2d 134 (1966), the Supreme Court of Mississippi confronted a motion to quash an indictment because of evidence presented by a convicted defendant that the number of Negroes who had served on a particular county's grand jury was totally disproportionate to the racial proportions of the population. The Court's decision, which directed quashing of both the indictment and the venire, stated in part:

> "In the instant case, the question arises whether jury service by the few Negroes as enumerated in this record either would be sufficient to show there was no unconstitutional discrimination, or to rebut the prima case under the Patton rule.(1) We do not not think it is. Under the facts set forth above and the established cases on the subject, the burden was on the State to rebut the prima facie case

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(1) The reference is to Patton v. Mississippi, 332 U.S. 463 (1947).

> developed by appellant, or to justify the exclusion as having been brought about for some reason other than racial discrimination. The State did not do this... 'Fairness in selection does not require proportionate representation of races upon a jury venire * * * It is nonetheless true that very decided variations in proportions of Negroes and whites on jury lists from racial proportions in the population, which variations are not explains and are long continued, furnish sufficient evidence of systematic exclusion of Negroes from jury services.'"(2)

See, to similar effect, Bass v. State, 182, So. 2d 591 (Mississippi Supreme Court, 1956); Brooks v. Beto, 366 Fed. 2d 1 (C.C.A. 5th 1966, en Banc.)

Plaintiff respectfully submits that, when courts sitting in the heart of the former Confederacy bear witness to the color blindness and freedom from class distinction in jury selection which the Constitution requires, the Judiciary of this State can hardly permit perpetuation of a system of unfair representation. Surely, it is unworthy of the dignity of the City and State of New York to assert procedural objections to delay consideration of the vital constitutional issues raised by the complaint herein.

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(2) The Mississippi Supreme Court quotes the 1962 decision of United States Court of Appeals for the Fifth Circuit in United States ex. rel. Seals v. Wiman, 304 F.2d 53, 59, 67.

The motions for leave to intervene as parties plaintiff should be granted, as should the motion to file an amended complaint. Defendants' motion to dismiss the complaint for lack of standing to sue should be denied.

Respectfully submitted,

LANS & FINK, ESQS.
Attorneys for Plaintiff,
Nathan Straus, and Prospective
Intervening Plaintiffs, The
National Association for Puerto
Rican Civil Rights, and Charles
S. McClain

CARL RACHLIN, ESQ.
Attorney for Prospective Intervening Plaintiff, The Congress
of Racial Equality

Of Counsel

Asher Lans, Esq.
Carl Rachlin, Esq.
Stephen Feinberg, Esq.

[Enclosed, Lans to Rachlin, 1967, March 3]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- x

NATHAN STRAUS,
Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, Comptroller of the City of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Defendants

- x

PRESENT CAPTION TO PROCEEDING

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- x

NATHAN STRAUS, CHARLES S. McCLAIN, THE CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS,

Plaintiffs,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, Comptroller of the City of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Defendants

- x

CAPTION TO PROCEEDING IF PENDING MOTIONS TO INTERVENE AS PARTY PLAINTIFFS ARE GRANTED

SUPPLEMENTAL AND REPLY JOINT BRIEF SUBMITTED ON BEHALF OF ORIGINAL PLAINTIFF AND PROSPECTIVE INTERVENING PLAINTIFFS IN SUPPORT OF MOTIONS FOR LEAVE TO INTERVENE AND SERVE AN AMENDED COMPLAINT, AND IN OPPOSITION TO MOTION TO DISMISS

Introductory Statement

In this brief the original and the prospective intervening plaintiffs reply to certain contentions made by the defendants and by the intervening defendant, the Attorney General of the State of New York, in papers which have been submitted to this court since plaintiffs filed their original brief. We also respectfully call the bench's attention to certain recent decisions of the federal courts.

POINT I

THE QUESTION OF STANDING TO SUE

In Point I of its Supplemental Brief, the New York State Attorney General objects to the motions to intervene previously made by THE CONGRESS OF RACIAL EQUALITY ("CORE") and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS ("THE PUERTO RICAN ASSOCIATION"). The Attorney General states that these associations have no more standing to sue than the original plaintiff. The Attorney General has not opposed the application to intervene made on behalf of Charles S. McClain.

By affidavit dated February 6, 1967, Irwin L. Herzog, Assistant Corporation Counsel, objects to Mr. McClain's motion to intervene, on the grounds that he "lacks the legal capacity to sue"; the original defendants have similarly objected to the motions to intervene made by CORE and by The Puerto Rican Association.

As set forth in Mr. McClain's moving papers, he is a member of virtually all of the classes of persons whom the complaint charges are subject to discrimination in the selection of grand jury panels in Bronx County. He is a 21-year-old single, educated but propertyless Negro, who resides in the Bronx, and the proposed amended complaint alleges that he is personally barred from serving on grand jury panels because he does not have $250 worth of property and also because of his race, of his youth, and the fact that he is not regularly employed.

Under such circumstances Mr. McClain, as a member of the aggrieved classes, clearly has standing as a party plaintiff in the present suit. As Mr. Justice Jackson stated in Cassell v. Texas, 339 U.S. 282 (1949):

> "I suppose there is no doubt, and if there is this court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or class action for an injunction or a mandamus against the state officers responsible."

CORE and The Puerto Rican Association, as set forth in their moving papers, have many hundreds of members who are resident in the Bronx, and who, like Mr. McClain, are discriminated against in the selection of grand jury panels. Under such circumstances and in light of the fundamental constitutional issues which are involved, these organizations have standing to assert the constitutional rights of their members. See National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958); Louisiana ex rel Gremillion v. NAACP, 366 U.S. 293; Pierce v. Society of the Sisters of the Holy Name, 268 U.S. 510 (1925); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 183-187.

POINT II

THE POSITIONS ASSERTED BY DEFENDANT, NEW YORK STATE ATTORNEY GENERAL

A.

In its Supplemental Brief (as in its principal memorandum), the defendant Attorney General seeks to dismiss only those portions of the complaint which attack the constitutionality of the property requirement embodied in Section 596 of the Judiciary Law of New York. The State, like the individual defendants, represented by the New York City Corporation Counsel, has not challenged the standing to sue of the individual (or prospective additional) plaintiff in the third and fourth causes of action. These causes of action therefore stand unchallenged at this time.

The State contends in its Supplemental Brief that the property qualifications set forth in Section 596 are constitutional because not intended to discriminate against Negroes and Puerto Ricans. The Attorney General further alleges that the property qualifications date from 1870 and therefore presumably are immune from challenge because of their antiquity.

Finally, the State asserts that the Commission which is currently studying revision of the New York State Constitution and the State Legislature (at the request of the Attorney General) are currently contemplating the elimination of the property qualifications of jurors. The Attorney General therefore suggests (p. 6 of Supplemental Brief) that the present "action be deferred" while the legislation and potential constitutional reform are pending.

The Attorney General, however, concludes by demanding that "this action should be dismissed and Judiciary Law, Section 596, should be upheld as constitutional."

It is respectfully submitted that all of the positions taken by the Attorney General are fallacious.

B.

Conceding, arguendo, that the property requirements of Judiciary Law, Section 596 (and its predecessor sections) were not intended to effect discrimination against Negroes and Puerto Ricans, they nevertheless on their face constitute the exclusion of impecunious persons from jury service, because of their poverty. Such exclusion is a per se violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. Harper v. Virginia

State Board of Elections, 383 U.S. 663 (1966); Hoyt v. Florida, 368 U.S. 57 (1961). The first, second, fifth and sixth causes of action are bottomed on this ground.

Moreover, regardless of the original legislative purpose in enacting property requirements for jury service, the limitation of such service to persons of affluence has the effect (conceded for purposes of this motion) of creating a substantial disparity between the percentage which the Negroes and Puerto Ricans constitute of the total population of the Bronx and the percentage which they constitute of the jury venires. This large disparity makes the property requirements of Section 596 of the Judiciary Law, violative of the Fourteenth Amendment, as it results in racial and ethnic discrimination, regardless of the intent of the legislative draftsmen. Whitus and Davis v. State of Georgia, U.S. Supreme Court, Nos. 650 and 253, October Term, 1966, United States Law Week, January 24, 1967, p. 4176. This result is not affected by the fact that defendant HANLEY, as County Clerk of the Bronx, may not have intended to discriminate because of race, color or ethnic origin. Norris v. Alabama, 294 U.S. 587, 598 (1935).

Similarly, the exclusion of day laborers and persons who are not regularly employed (such as the prospective intervening plaintiff McClain) from grand jury panels in Bronx County, as charged in the fourth cause of action, is violative of the Equal Protection clause. Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Labat v. Bennett (CCA 5th, en banc, August 15, 1966, United States Law Week, August 15, 1966, p. 2127).

C.

The fact that New York has imposed a property requirement upon jury service for almost a century does not make Section 596 of the Judiciary Law constitutional. Antiquity does not make an offensive statute constitutional nor immunize it from attack.

The poll tax requirements for participation in state balloting which the United States Supreme Court struck down in Harper v. Board of Elections, supra, had a still hoarier history and indeed dated back to the beginnings of the Republic. See Breedlove v. Suttles, 302 U.S. 277 (1937). In Erie Railroad Co. v. Tompkins, 304 U.S. 64

(1938) the Supreme Court reversed its 1842 decision in Swift v. Tyson, 16 Pet. (U.S.) 1, and overruled on constitutional grounds an interpretation of Section 34 of the Federal Judiciary Act of 1789 (C. 20, 28 U.S.C.A., Section 725) which had been in effect since the formation of the Federal Union.

Only a month ago the United States Supreme Court reminded us that it will constantly review and where necessary overrule its own decisions, in order to protect the fundamental rights of citizens, protected by the Bill of Rights. Keyishian et al v. The Board of Regents of the State of New York, No. 105, October Term, 1966, United States Law Week, January 23, 1967, p. 4152, overruling in part, Adler v. Board of Education, 342 U.S. 485.

As Mr. Justice Holmes stated in Missouri v. Holland, 252 U.S. 416, 433 (1920):

> "The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

In the words of President Woodrow Wilson:

> ". . . we have read into the Constitution of the United States the whole expansion and transformation of our national life that has followed its adoption." Wilson,

Constitutional Government in the United States (1908) (Ed.) p. 157.

Under these controlling principles of constitutional interpretation, it can scarcely be doubted that the property requirements and vague qualification standards, set forth in Section 596 of the Judiciary Law, and the failure of grand jury panels in the Bronx to represent a reasonable cross-section of the entire population of the county are violative of the Equal Protection clause of the Fourteenth Amendment under the most recent decisions of the federal courts, as set forth in pp. 17 to 38 of our principal brief.

D.

The fact that the New York State Legislature, or the pending Constitutional Convention, may amend or supersede Section 596 of the Judiciary Law, does not preclude the courts from presently considering the constitutionality of this statute.

Congress found it appropriate to propose the XXIVth amendment to the United States Constitution, in order to ban the application of all poll taxes in federal elections. It was authoritatively held that the adoption of this amendment did not erase the payment of poll taxes as a constitutionally permitted prerequisite to voting for members of state legislatures. Harman v. Forssenius, 380 U.S. 528 (1965).

The State of Virginia subsequently contended that these circumstances precluded a constitutional attack on the imposition of poll taxes as a prerequisite to voting in state elections. The United States Supreme Court held that the judiciary were the final judges of the constitutionality of state elections, and not Congress and the state legislatures. Harper v. Virginia, supra.

It is therefore respectfully submitted that there is no basis for deferring decision upon the present law suit, pending such acts as the New York State Legislature or the Constitutional Convention may choose to take with respect to the composition of grand juries.

CONCLUSION

The Constitution of the United States is color blind and free of discriminations based on economic status or occupation. It is therefore respectfully submitted that the motions for leave to intervene as party plaintiffs and file an amended complaint should be granted and that defendants' motion to dismiss the complaint for lack of standing to sue should be denied.

Respectfully submitted,

LANS & FINK, ESQS.
Attorneys for Plaintiff,
Nathan Straus, and Prospective
Intervening Plaintiffs, The
National Association for Puerto
Rican Civil Rights, and Charles
S. McClain

CARL RACHLIN, ESQ.
Attorney for Prospective Intervening Plaintiff, The Congress
of Racial Equality

Of Counsel

Asher Lans, Esq.
Carl Rachlin, Esq.
Stephen J. Feinberg, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

--x

NATHAN STRAUS,

Plaintiff,

-against-

Index Number
5401/1966

JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, Comptroller of the City of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Present Caption

Defendants.

--x

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

--x

NATHAN STRAUS, CHARLES S. McCLAIN, THE CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS,

Plaintiffs,

Proposed Amended
Caption

-against-

JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Defendants.

--x

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE FIRST, SECOND, THIRD, FIFTH AND SIXTH CAUSES OF ACTION IN THE ORIGINAL AND AMENDED COMPLAINTS AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

State of New York)
ss:
County of New York)

ASHER LANS, being duly sworn, deposes and says:

1. I am one of the attorneys for the original and proposed intervening plaintiffs herein.

2. Upon consent of all parties, in Court on February 24, 1967, the plaintiffs have made an oral motion for summary judgment and defendants' orally cross-moved for summary judgment.

Plaintiff seeks summary judgment only in the first, second, third and fifth causes of action. We do not seek summary judgment in the fourth cause of action, which we believe poses complicated and disputed issues of fact which, as will be discussed below, can only be resolved upon trial.

The defendants seek summary judgment in all six causes of action.

3. The following motions are now pending before this Court simultaneously:

A. Motions to intervene as parties plaintiff:

(i) Motion of Charles S. McClain, a 21 year old, educated but propertyless negro, who resides in the Bronx, seeks leave to intervene on the grounds that he is personally barred from serving on grand jury panels because of his lack of affluence, because of his race, and because of his youth. Defendants Hanley and Procaccino oppose the plaintiff's motion; defendant Lefkowitz has not opposed this motion.

(ii) The motions of The National Association for Puerto Rican Civil Rights ("The Puerto Rican Association") and The Congress of Racial Equality ("CORE"). These motions are made on behalf of large numbers of Negro and Puerto Rican members of these organizations, who it is alleged are barred from service on grand juries in the Bronx.

All the defendants have opposed the intervention motions made by CORE and The Puerto Rican Association.

B. The original and the above named prospective intervening plaintiffs have moved for leave to serve an amended complaint.

The proposed pleading (attached to the motion papers) does not raise any new substantive issues. Its purpose is to establish the standing of the prospective additional plaintiffs to assert the issues raised in the original complaint.

The defendants have not taken any position with respect to this motion.

C. The defendants have moved to dismiss the complaint on the sole ground that the original plaintiff, who was suing as a taxpayer, does not have the authority under Section 51 of the General Municipal Law to attack the Constitutionality of a State Statute.

The motions to dismiss the complaint for lack of standing to sue ignore the Fourth Cause of Action of the original complaint (and the amended complaint), which asserts that the original defendants are engaged in deliberate and systematic violation of Section 609 of the Judiciary Law.

D. The motions for summary judgment described above.

4. Plaintiff respectfully submits that the motions for leave to intervene and to submit an amended complaint (Captions A and B above) should be decided and granted before this Court acts on defendants' motion to dismiss the complaint on the grounds of the original plaintiff's alleged lack of standing to sue.

The prospective intervenors all are members of or speak for classes which are discriminated against in selection of grand and petit jury panels in Bronx County. Under such circumstances, these prospective intervenors clearly have standing to complaint of the exclusion of the classes to which they belong. Hernandez v. Texas (347 U. S. 477); Cassell v. Texas (339 U. S. 282, 287); Fay v. New York (332 U. S. 261, 289-90); Labatt v. Bennett (--f.2d--slip opinion, pp. 55-56, 5th Cir. 1966) (CCA 5th, en banc, August 15, 1966, United States Law Week, August 15, 1966, p. 2127); United States v. Hoffa (205 Supp. 710, 719, U.S.D.C. Fla.).

5. I do agree with the statement made in paragraph 3 of the Affirmation made by Irwin L. Herzog, Assistant Corporation Counsel, that the precedural motions should be decided prior to the motions for summary judgment.

However, as pointed out in Point V of our principal brief, this Court should make a preliminary evaluation of the merits of the complaint prior to the ruling of the motions to dismiss made by the defendants.

Judge Keating of the Court of Appeals in Matter of Donahue v. Cornelius, 17 N. Y. 2d 390, 397 (1966) referred to:

> ". . . the exception to the rule of practice under which this court on occasion decides questions which even though moot as between the parties affect the entire State or transactions of a similar character which are numerous and likely to arise with frequency . . ."

Similarly, the Court of Appeals stated in Kuhn v. Curran, 294 N.Y. 207 (1945), wherein plaintiff taxpayer sought a declaratory judgment as to the invalidity of certain sections of the Judiciary Law, in an action commenced against the Secretary of State :

> "In view of the importance to the public of an authoritative determination of . . . [the] question at the present time, we do not pause to consider whether the question is presented in appropriate proceedings." Kuhn, supra 294 N.Y. 207, 213, 61 N.E. 2d 513, 515 (1945)

This Court rendered a similar finding in Peters v. New York City Housing Authority, 128 N.Y.S. 2d 224 (1954), wherein it stated:

> "Moreover, since the case presents issues of vital concern and importance to the community generally, the court should disregard these purely technical objections and should resolve the main and basic questions raised by the petitions." Peters, supra, at 233.

6. The defendants, County Clerk of the Bronx, and Comptroller of the City of New York, have conceded the importance of the issues raised in the original and amended complaint, by agreeing in open court to submissions, at this time, of oral cross-motions for summary judgment. Under such

circumstances, it is respectfully submitted that this Court should ignore technical procedural objections and permit a speedy determination of the merits of the case.

7. The corporation counsel contends that the methods used in the selection of jurors in Bronx County have been fully sustained in the opinion of Mr. Justice Carney in People v. Rodriguez, N.Y.L.J. 12/7/66 Vol. 156, No. 108, p. 17, and that Judge Carney's opinion is decisive of the issues presented in the instant complaint. In that opinion, Judge Carney held that Rodriguez had not demonstrated at his trial that Puerto Ricans were discriminated against in this selection of Bronx County jurors.

With due respect, the corporation counsel's position is basically irrelevant to the issues presently before the Court.

In the first place, the decision in the Rodriguez case merely dealt with the charge of systematic exclusion of Puerto Ricans from petit and grand jury panels in the Bronx. This issue is set forth only in the Fourth Cause of Action in the present complaint. Even as to the Fourth Cause of Action, Judge Carney's decision is not entitled to finality on the issues presently raised, as will be demonstrated in paragraph 8 of this affidavit.

Secondly, the First, Second, Fifth and Sixth Causes of Action herein attack the constitutionality of that portion of Section 596 of the Judiciary Law, which conditions eligibility for jury service upon possession of property. Judge Carney's decision did not deal with this question.

The Third Cause of Action herein contends that certain of the qualifications for jury service contained in Section 596 of the Judiciary Law are so vague that they do not meet the standards of constitutionality set forth in the Fourteen Amendment. This issue also has not been ruled upon in Judge Carney's decision in the Rodriguez case.

Hence, at most, the decision in the Rodriguez case upon which the corporation counsel relies, can be read only as relating to the Fourth Cause of Action herein.

8. In the present Fourth Cause of Action, the original and intervening plaintiffs contend that the defendant, County Clerk, discriminates in the selection of members of grand jury venires in the Bronx County, by systematic exclusion (or mere token inclusion) of Negroes, day wage earners, indigents and young persons, as well as Puerto Ricans. Judge Carney's decision merely holds that on the facts which were presented to him, there was no proof of systematic discrimination against Puerto Ricans in selection of Bronx County juries. Such a finding has nothing to do with the question of whether or not the other classes of persons referred to in the Fourth Cause of Action are systematically excluded from Bronx County jury panels. Moreover, on the defendants' motion for summary judgment dismissing the complaint, all of the facts pleaded in the complaint must be deemed to be admitted. Equitable Life Assurance Society v. Volk, 256 A.D. 348, 10 N.Y.S. 2d 59; Felt v. Germania Life Insurance Co., 149 A.D. 14, 133 N.Y. Sup. 519.

The present plaintiffs are not bound by the record created in the Rodriguez case. An examination of Judge Carney's decision and of the court papers indicates that Rodriguez may indeed have failed to prove that there was discrimination against Puerto Ricans and that he presented an incomplete case. The present plaintiffs, however, are entitled to their day in court and will prove that factual discrimination does exist in the selection of Bronx County jury venires as to Puerto Ricans, as well as to Negroes, workers and young persons.

9. Among other things, Judge Carney held, in the Rodriguez case, that the plaintiff has not established that there was "a definable class in Bronx County known as Puerto Ricans." Whether or not this was true of Rodriguez' proof that Puerto Ricans existed as a separate "class," the simple fact of color difference would be accepted by most people as establishing that there is a definable "class" in the Bronx County known as "Negro." The prospective intervenors, McClain and CORE, belong to this class and are entitled to show that this class has been systematically excluded in the formation of grand jury venires in the Bronx.

10. The proof or disproof of the Fourth Cause of Action depends upon a factual showing as to whether or not there has been discrimination in the selection of grand jury panels. Such proof can only be adduced at a trial.

It is for this reason that plaintiffs have not moved for summary judgment on the Fourth Cause of Action.

Similarly, we respectfully submit that the defendants' motion for summary judgment must be denied as to the Fourth

Cause of Action and the issue referred to trial term.

11. The issues raised by the First, Second, Third, Fifth and Sixth Causes of Action are purely legal and can and should be decided by this Court upon the cross-motions for summary judgment.

It is therefore respectfully submitted that the motions for leave to intervene as parties plaintiffs should be granted; that the original and intervening plaintiffs should be granted leave to file and serve the amended complaint herein; that the motions to dismiss for lack of standing to sue should be denied; that defendants' motion for summary judgment should be denied and that plaintiffs' motion for summary judgment on the First, Second, Third, Fifth and Sixth Causes of Action should be granted.

Sworn to before me this
6th day of March, 1967.

NORMAN S. FINK
NOTARY PUBLIC, STATE OF NEW YORK
No. 60-6295650
Qualified in Westchester County
Certificate filed in New York County
Term Expires March 30, 1968

SUPREME COURT : BRONX COUNTY

- -x

Index Number
5401/1966

NATHAN STRAUS,

Plaintiff,

-against-

PRESENT CAPTION

JOHN J. HANLEY, County Clerk of
Bronx County, MARIO A. PROCACCINO,
Comptroller of the City of New York,
and LOUIS LEFKOWITZ, Attorney
General of the State of New York,

Defendants.

- -x

NATHAN STRAUS, CHARLES S. McCLAIN,
THE CONGRESS OF RACIAL EQUALITY and
THE NATIONAL ASSOCIATION FOR PUERTO
RICAN CIVIL RIGHTS,

Plaintiffs,

-against-

PROPOSED AMENDED
CAPTION

JOHN J. HANLEY, County Clerk of
Bronx County, MARIO A. PROCACCINO,
Comptroller of the City of New York,
and LOUIS LEFKOWITZ, Attorney
General of the State of New York,

Defendants.

- -x

BRIEF OF THE DISTRICT ATTORNEY OF BRONX COUNTY ON BEHALF OF THE DISTRICT ATTORNEYS ASSOCIATION, STATE OF NEW YORK, AMICUS CURIAE.

INTRODUCTORY COMMENT

On or about April 6, 1966, plaintiff Nathan Straus instituted this taxpayer's action against the County Clerk of Bronx County and the Comptroller of the City of New York, urging some six causes of action in the complaint, and seeking particular types of injunctive relief. In essence, the suit amounts to an attack on the constitutionality of New York's statute prescribing requirements for jury service (Judiciary Law, §596), and also the manner in which the Bronx County Clerk carries out his statutory duties respecting the selection of grand jurors.

Four of the causes of action (Nos. 1, 2, 5 and 6) challenge the constitutionality of the present statutory requirement that any prospective juror must,

> "Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value."
> (Judiciary Law, §596, Subd. 3)

The pertinent causes of action all allege, in substance, violations of the constitutional right of indigent persons to serve on juries and of the constitutional right of prospective defendants to due process of law and equal protection of laws resulting from State action, in that persons not meeting the property requirement are excluded from service on both petit and grand juries (See, e.g., Allegation Nos. 7, 8, 11, 12, 31, 33, 35, 36).

The third cause of action asserts that the same constitutional rights are violated for another reason -- viz., that certain statutory provisions, essentially because of vagueness, give the County Clerk of the Bronx virtually unlimited discretion to decide just who shall serve on grand juries in the pertinent County. As we perceive the claim, it is predicated upon language in a particular statute (Judiciary Law, §609) to the effect that the County Clerk shall make a list of persons suitable to serve as grand jurors after having made a particular type investigation. That provision, plaintiff asserts, when read together with the additional statutory requirement that all jurors be, among other things, intelligent, of sound mind, of good character, and well informed (Id., §596, Subd. 6), are arbitrarily employed by the County Clerk to make himself the sole judge of just who will be permitted to serve as a grand juror in Bronx County.

The gist of the fourth cause of action is that the defendant Hanley intentionally and systematically excludes Negroes and Puerto Ricans, except for token numbers, as well as day wage earners, indigents and young persons, from grand jury service in Bronx County.

Finally, the complaint demands judgment against defendant Hanley, enjoining said defendant from drawing any additional grand or petit jurors in the County of Bronx until the discontinuance of the allegedly unconstitutional procedures heretofore used in the selection of such persons. Judgment is also demanded against defendant Procaccino, enjoining the said defendant from authorizing or making any further payments for service as a grand or petit juror until the practices complained about are discontinued.

In their answer, the defendants herein denied many of the allegations of the complaint. We note, however, that the answer does not contain a denial of the allegation (No. 7) that defendant Hanley excludes from the grand jury list persons who do not meet the property requirements of Section 596, Subdivision 3.

Apparently, defendants also moved to dismiss the original complaint under Rule 3211(3) of the C.P.L.R. on the grounds that plaintiff Straus lacked the capacity to sue.

Subsequently, motions to intervene in this litigation were brought on by one Charles S. McClain, The Congress of Racial Equality, and The National Association for Puerto Rican Civil Rights. The prospective intervening plaintiffs have also applied for permission to serve an amended complaint.

The affidavit of Mr. McClain in support of his motion, dated September 8, 1966, describes himself as a 21-year-old, unmarried Negro who has " * * * little money. I have no assets except for my clothing and a ring worth about $100.00. I am not presently employed * * *." The affidavits in support of the motions by the two other prospective interveners assert, insofar as here pertinent, claims to the effect that members of their organizations are being systematically excluded from grand jury service.

The first cause of action in the proposed amended complaint alleges that Mr. McClain is excluded from service as a grand juror in the County of Bronx solely because he does not meet the property requirements of Section 596 (Allegation No. 2); that the other prospective interveners are suing as representatives of the many hundreds of members of their organizations residing in Bronx County (Allegation No. 3); that the individual prospective intervener and many members of the groups represented by the other interveners do not own property sufficient to meet the statutory requirement for jury service (Allegation No. 9); and that the aforesaid individuals have been and are being illegally deprived of their right to serve as grand jurors (Allegation No. 12). Those assertions are incorporated by reference into the second cause of action.

Similarly, some of the allegations already described are incorporated by reference in the third cause of action, wherein it is further claimed, in substance, that defendant Hanley, by exercising what is described as an "arbitrary power," has wrongfully deprived Mr. McClain and members of the groups which also seek to intervene of their right to serve as grand jurors (Allegation No. 21).

In addition to incorporating certain allegations from the first cause of action, the various assertions making up the fourth cause of action, includes a claim, upon information and belief, to the effect that Mr. McClain and members of the other groups which seek to intervene herein have been systematically excluded from grand jury service along with day workers, indigent and young persons (Allegation No. 31).

Among other allegations, the fifth and sixth causes of action allege that Mr. McClain and members of the two other pertinent groups have been and are being deprived of the right to serve upon petit juries because they fail to meet the property requirements specified in Section 596 of the Judiciary Law (Allegation Nos. 35, 36, 38, 39).

A brief submitted in support of the motions to intervene advances the premise (p.3) that, even assuming plaintiff Straus lacks the requisite capacity to sue, that "procedural deficiency is totally overcome by the status of the prospective intervenors." The Corporation Counsel of the City of New York has taken issue with the soundness of that proposition, urging that the prospective interveners are likewise without legal capacity to sue -- a view shared by the District Attorneys Association.

Apparently on February 24, 1967, an oral motion for summary judgment on the first, second, third and fifth causes of action was made by the original plaintiff, and, on the same occasion, a representative of the Corporation Counsel moved orally for summary judgment as to all six causes of action.

Thereafter all parties to this litigation, by their respective attorneys, indicated no opposition to having the District Attorneys Association file a brief as amicus curiae. As to the interest of the Association, we hardly think it necessary to comment that District Attorneys throughout the State of New York all agree that grand and petit juries should contain cross-sections of the community truly representative of the diverse groups contained in the general population. Thus, the Association is quite pleased with the fact that Legislation, effective September 1, 1967, has eliminated the property requirement for jury service (Laws 1967, Ch. 49).

It is our belief, however, that the attack upon the constitutionality of the property requirement presently on the statute books lacks merit, and that, in any event, a determination of that issue may not be made on a motion for summary judgment, but rather requires a factual hearing. In a practical vein, we wish respectfully to point out to the Court that a declaration that the property requirement in the pertinent statute is unconstitutional would inevitably lead to an untold number of post-conviction applications by persons claiming that their convictions had been obtained in violation of their constitutional rights. Thus, even assuming that such a declaration would be applied prospectively, the practical result conceivably might well be that District Attorneys Offices would be inundated with the relevant type of post-conviction application.

In the recent case of People v. Eugene Rodriguez (opinion by Mr. Justice Carney, N.Y.L.J. 12/7/66, p. 17, cols. 7 and 8), the District Attorney of Bronx County was faced with a claim that people of Puerto Rican extraction were intentionally and systematically excluded from grand jury service in that County. Rather than raise any technical objections to that contention, the Office in question joined in the defendant's application, with the result that a full hearing was given to the defendant Rodriguez, who was at the time represented by the eminent criminal law firm of Williams and Waden, Washington, D.C. Defense attorneys interviewed persons charged with the selection of jurors in Bronx County and examined pertinent records in advance of the hearing, which consumed at least five Court days.

The testimony at the hearing covered the selection of petit and grand jurors, beginning with the procedure whereby persons are summoned for service as a petit juror all the way through the selection of grand jurors from the annual list by the County Jury Board, which is presided over by the Presiding Justice of the Appellate Division, First

Department. Moreover, many exhibits were placed in evidence during the hearing. In addition, proof was offered to show that for many years the persons charged with the legal responsibility for providing jurors in Bronx County have bent over backwards in an effort to insure representation on juries of a cross-section of the community, and to avoid mere "tokenism."

As a result of the Bronx County District Attorney's experience with the Rodriguez case, the Association is convinced that the plaintiff's claim that defendant Hanley intentionally and systematically excludes any group from jury service by misuse of his statutory powers or otherwise, as alleged in the third and fourth causes of action, is totally without merit. It is the Association's further view that such claims present factual issues, with the result that they cannot be determined on a motion for summary judgment [C.P.L.R., R.3212(b)]-- a point conceded as to the fourth cause of action by the plaintiff (See Brief, pp. 7-8).

Indeed, the District Attorney of Bronx County feels that the hearing record in the Rodriguez case so clearly points up the lack of merit in the plaintiff's allegations that he has invited counsel for the plaintiff and the prospective interveners to examine the transcript of the hearing and the various exhibits. Counsel has indicated a willingness to make that examination, perhaps during the week of April 24, 1967, and, hopefully, the result of that procedure might well be that the Rodriguez hearing record would be submitted to this Court to obviate the necessity for a further hearing.

POINT ONE

THE PLEADINGS HEREIN RAISE FACTUAL ISSUES PRECLUDING A DETERMINATION OF THE QUESTIONS PRESENTED ON A MOTION FOR SUMMARY JUDGMENT.

We have seen that the instant litigation was instituted in order to obtain a declaration respecting the constitutionality of the property requirement for service as a juror contained in Section 596 of the Judiciary Law and to establish that certain groups of persons are intentionally and systematically excluded from grand jury service in Bronx County as a result of the defendant Hanley misusing statutory powers.

No claim that he had been excluded from jury service has been voiced by plaintiff Straus. Prospective intervener McClain likewise does not level such an accusation, choosing instead to make the bold assertion that, due to his indigency and/or race, he would be excluded from jury service in Bronx County. Moreover, the other prospective interveners have made virtually the same type of conclusionary allegations as Mr. McClain on behalf of persons in their organizations who reside in the Bronx.

Assuming for the moment that the various applications to intervene in this litigation are granted, there can be no doubt that the issues raised by the amended complaint and the answer to the original complaint raise factual issues, with the result that the apparent agreement made by the parties heretofore -- that this suit, in part at least, be treated as a motion for summary judgment -- is in legal effect a nullity [C.P.L.R., R.3212(b); *Crowley's Milk Co., Inc.* v. *Martin B. Klein*, 24 A.D. 2d 920 (3rd Dept. 1965), and cases cited therein].

In *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220-1 (1945), the Supreme Court of the United States pointed out that certain groups may not be excluded from jury service -- viz., economic, social, religious, racial, political and geographic. Moreover, while that Court has also indicated that proportional limitation of a racial group is not permissible, it has also stated that "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation" [*Cassell* v. *Texas*, 339 U.S. 282, 286-7 (1950)]. More recently, in dealing with the problem of alleged exclusion, the courts have made inquiries to determine whether or not the class which the moving party claims has been excluded is in fact one of the six aforesaid non-excludable groups. For example, in *United States* v.

Greenberg, 200 F. Supp. 382 (S.D.N.Y. 1961), the Courts rejected the defendant's claim to the effect that the use of a list of registered voters as a source of prospective grand jurors had the effect of excluding person who were not registered to vote, and the Court pointed out that non-registrants did not constitute a non-excludable class, but rather they included persons of all the six groups about which the Supreme Court had spoken /See also, United States v. Curry, 358 F. 2d 904, 916-7 (2d Cir. 1966); United States v. Agueci, 310 F. 2d 817 (2d Cir. 1962)7.

Thus, the starting point in any analysis of the claim of systematic exclusion is to determine whether or not a definable class exists, and the burden of establishing the existence of such a class is upon the person claiming discrimination /Hernandez v. Texas, 347 U.S. 475, 479 (1954)7. Hernandez indicated that one way of demonstrating the existence of a definable class is to show the attitude of the community, and it viewed as a sufficient "showing" proof to the effect residents of the community distinguished between "White" and "Mexican"; that participation of persons of Mexican descent in business and community groups was slight; that, until recent times children of Mexican descent were required to attend a segregated school for the first four grades; that one restaurant in a particular town displayed a sign announcing "No Mexicans Served" ; and that, on the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Homres Aqui" ("Men Here"). Various state cases decided after Hernandez indicate that a change in community attitude might well have the result of eliminating the existence of a definable class /State v. Lopez, 182 Kan. 46, 318 P. 2d 662, 665-6 (1957); Ramirez v. State, 293 S.W. 2d 653, 654-5 (Tex. Cr. App. 1956)7.

In the instant case, there is absolutely no evidence to demonstrate that, as a result of community attitude or any other cause, Bronx County contains a definable class excluded from jury service solely because they fail to meet the property requirements of Section 596 -- which requires a prospective juror, or his spouse, to be the owner of real or personal property of the value of $250.

While prospective intervener McClain alleges in the proposed amended complaint that he is excludable from jury service because of his inability to meet the property requirements, his affidavit of nearly a year ago indicates that he has " * * * little money * * * clothing * * * and a ring worth about $100.00 * * *." -- items which well might aggregate the required $250. Furthermore, the various papers submitted by the other prospective interveners, as well as the proposed amended complaint, contain no specifics respecting the wealth of the members of the pertinent organizations on whose behalf intervention is sought.

It is the Association's position, based upon the evidence adduced in the Rodriguez hearing and its familiarity with economic conditions in the City of New York, that there is no definable class of persons which solely because of poverty is excluded from jury service in Bronx County. Poverty, of course, knows no religious, racial, political or geographic bounds. But, it is common knowledge that the most impoverished citizens of New York City are given allowances for food, clothing, shelter and living expenses, with the result that it would be virtually impossible to find persons, otherwise qualified for jury service, who are excludable because they and their spouses do not, between them, possess property valued at $250. As a matter of fact, the Rodriguez record indicates that the pertinent requirement is disregarded in Bronx County.

At this juncture we stop to take issue with plaintiff's assertion (Brief, pp. 12-13; Lans Affidavit, p. 7) that for present purposes all the allegations of the complaint must be deemed true. As to that, it must be remembered that defendants originally moved to dismiss the complaint on the ground that the plaintiff Straus lacked capacity to sue. Accordingly, while we agree that that plaintiff's allegations respecting capacity would necessarily be deemed true for purposes of a dismissal motion, the other allegations in the complaint are irrelevant. It follows, therefore, that, if the motion to dismiss were to be denied, a hearing would still be required to resolve the factual issues raised by the pleadings [See, e.g., *Conklin* v. *Palisades Interstate Park Commission*, 278 App. Div. 588 (2d Dept. 1951); *Ascher Corp.* v. *Horvath*, 35 M. 2d 375 (Sup. Ct. N.Y. Cty 1962)].

In its present state, the record in this case does not, as plaintiff suggests (Lans Affidavit, p. 2), permit a determination by this Court as to whether or not the property requirement in Section 596 is unconstitutional on its face. For one thing, the sophistry of such an approach is that the existence of an excludable class is presumed, in total disregard of the Supreme Court's teaching in *Hernandez* v. *Texas*, *supra*, to wit, that a problem of constitutional dimensions does not exist unless the party claiming to be aggrieved establishes the existence of a definable class of persons which is allegedly being excluded from jury service. Moreover, it is axiomatic that " * * * legislative enactments [are] supported by a presumption of validity so strong as to demand of those who attack them a demonstration of invalidity beyond a reasonable doubt, and the courts strike them down only as a last unavoidable result [citing cases]. This presumption is accompanied by another as to the statute: that the Legislature has investigated and found the existence of a situation showing or indicating the need for or desirability of the legislation" [*In the Matter of Christiaan Van Berkel* v. *Power et al.*, 16 N.Y. 2d 37 at 40 (1965)].

The Association's view on this subject is perhaps best summarized in the following remarks of one of the appellate courts in this State:

> "We do not think that the constitutionality of a statute which has remained unchallenged for thirty years should be determined upon affidavits. Under the circumstances the background facts should be developed." /Defiance Milk Prods. Co. v. Du Mond, 282 App. Div. 977 at 978 (3rd Dept. 1953); 83 A.L.R. 2d, Anno: Summary Judgment, Sec. 4, pp. 840-1/.

Turning now to the third cause of action, we respectfully submit our view that it too presents a factual issue. To begin with, we must confess an uncertainty as to the thrust of the allegations constituting the third cause of action. As we perceive it, the contention is something to the effect that defendant Hanley is permitted to be arbitrary in the selection of petit jurors because of the alleged vagueness of certain requirements for jury service set forth in Section 596. Thereafter, the statutory mandate contained in Section 609 of the same Law -- that he conduct a special investigation to find persons suitable for grand jury service -- is used by that defendant to further his desire of excluding certain groups from grand jury service. Those allegations have been denied in the answer to the original complaint, and certainly no determination of that issue may be made at this point in the suit.

At this time, we merely wish to observe that the salient allegations are predicated upon information and belief. Also, we do not deem the relevant provisions of Section 596 to be vague, for no one can seriously urge that all jurors should not be required to possess certain minimal abilities with which they may properly discharge their legal obligations. Additionally, we interpret the "special investigation" provision in Section 609 as being limited to the subject of whether or not a prospective grand juror has a criminal record -- a fact which would bar service as a grand juror (Judiciary Law, §595).

We have already remarked that plaintiff does not seek summary judgment with respect to the fourth cause of action, dealing with the claimed exclusion of minority groups and others from grand jury service. Here again, the Association feels that the exclusion issue was put to rest by the Rodriguez hearing, which was presided over by another Justice of this Court [See, e. g., United States v. Bowe, 360 F. 2d 1, at 6-7 (2d Cir. 1966); United States v. Kelly, 349 F. 2d 720, 777-778 (2d Cir. 1965)].

While the opinion of Mr. Justice Carney dealt essentially with the claimed exclusion of people of Puerto Rican extraction from grand jury service in the Bronx, the evidence heard by him covered all aspects of juror selection in Bronx County and was exhaustive enough to establish that no group of persons whatsoever was being excluded from grand jury service in that County. Indeed, in our judgment that record shows a most commendable, long time effort by the people concerned to provide cross-sections of the populace in all juries.

As previously indicated, the plaintiff and the prospective intervening plaintiffs have been invited to examine the transcript of the Rodriguez hearing and the exhibits produced in evidence therein -- an event which hopefully will occur in the very near future. Certainly, the Association supports the concept that all juries should contain a cross-section of the community, and it is confident about the outcome in the event that this Court directs that a hearing be held to determine the validity of the claims made by the plaintiff in this litigation. Accordingly, if this Court does not deem itself bound by Judge Carney's determination and if the parties to this suit do not agree upon a submission of the Rodriguez hearing record to this Court as an agreed statement of facts, the Association, and the Bronx District Attorney's Office in particular, will assist the Court in any way it deems necessary to reach a determination.

But, the Association does feel strongly that, on the basis of the present record before this Court, no determination may be made respecting the constitutionality of the property requirement for service as a juror contained in Section 596 of the Judiciary Law. Entirely apart from its legal position, the Association has a practical concern, to wit, that a declaration of unconstitutionality at this time would give rise to countless post-conviction applications to set aside judgments, albeit the Courts apply the ruling prospectively and although the property requirement for jury service is to be abolished on September 1, 1967 [See, Chestnut v. The People of the State of New York, 370 F. 2d 1, at 6-8 (2d Cir. 1966) cert. den. 35 U.S.L.W. 3366--4/18/67].

CONCLUSION

IN THE EVENT THAT THE DEFENDANTS' MOTION TO DISMISS IS DENIED, A HEARING SHOULD BE ORDERED TO DETERMINE THE ISSUES RAISED BY THE PLEADINGS.

Respectfully submitted,

ISIDORE DOLLINGER
District Attorney
Bronx County
On Behalf of the
District Attorneys Association
State of New York
Amicus Curiae

DANIEL J. SULLIVAN
PETER R. DeFILIPPI
Assistant District Attorneys, Bronx County,
of Counsel

April 24, 1967.

SUPREME COURT : BRONX COUNTY

- x

Index Number
5401/1966

NATHAN STRAUS,
Plaintiff,

-against-

PRESENT CAPTION

JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, Comptroller of the City of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Defendants.

- x

NATHAN STRAUS, CHARLES S. McCLAIN, THE CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS,

Plaintiffs,

PROPOSED AMENDED
CAPTION

-against-

JOHN J. HANLEY, County Clerk of Bronx County, MARIO A. PROCACCINO, Comptroller of the City of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Defendants.

- x

SUPPLEMENTAL BRIEF OF THE ORIGINAL PLAINTIFF AND PROSPECTIVE INTERVENING PLAINTIFFS, IN REPLY TO BRIEF SUBMITTED BY THE DISTRICT ATTORNEYS' ASSOCIATION, STATE OF NEW YORK

INTRODUCTORY COMMENT

The District Attorney of Bronx County, on behalf of the District Attorneys Association, State of New York, has filed a brief amicus curiae herein with the consent of all parties. The purpose of this Supplemental Memorandum is to present the views of the original plaintiff and the prospective intervening plaintiffs with respect to the allegations contained in said brief amicus curiae. In this connection, we further respectfully refer the Court to the previous briefs filed in this matter by the plaintiffs.

(The brief filed on behalf of the District Attorneys Association, State of New York, is referred to hereinafter as "District Attorneys' Brief." Unless otherwise stated, all references contained herein are references to the District Attorneys' Brief.)

The District Attorneys' Brief makes the following principal points:

1. Neither the original plaintiff nor the prospective intervenors have the capacity to sue (p. 6).

2. The defendants' motion for summary judgment as to all six causes of action should be denied, on the grounds that the case presents issues of fact which must be decided at trial.

3. " ... on the basis of the present record before this Court, no determination may be made respecting the constitutionality of the property requirement for service as a juror contained in Section 596 of the Judiciary Law." (pp. 18-19). Hence, plaintiffs' cross-motion for summary judgment on the First, Second, Third, Fifth and Sixth causes of action should be denied.

4. The opinion rendered by Mr. Justice Carney in People v. Eugene Rodriguez (N.Y.L.J. 12/7/66, p. 17, cols. 7 and 8) establishes that "no group of persons whatsoever was being excluded from grand jury service" in the Bronx; Judge Carney's opinion and the hearing record in the Rodriguez case bind the parties to the present litigation and establish that there is and has been no discrimination in the selection of Bronx County grand jurors.

The original plaintiff and prospective intervening plaintiffs agree with the second proposition set forth in the District Attorneys' Brief, described above. We disagree with the first, third and fourth propositions stated by the District Attorneys Association, State of New York.

POINT I

BOTH THE ORIGINAL PLAINTIFF AND THE PROSPECTIVE INTERVENING PLAINTIFFS HAVE STANDING TO SUE

The District Attorneys Association supports the argument of the New York State Attorney General and the New York City Corporation Counsel that neither the original plaintiff nor the prospective intervening plaintiffs have the capacity to sue herein (p. 6).

This contention has been answered in pages 1-3 inclusive of our Supplemental Brief and pages 14 to 17 and 38 to 64 inclusive of our principal brief. Indeed, we find it incredible that the District Attorneys Association raises its present procedural objection.

The Association has stated that it "supports the concept that all juries should contain a cross-section of the community ..." (p. 18). The public interest in the orderly administration of justice would seem to require that there be obtained as soon as possible a current and authoritative ruling as to the constitutionality of the New York jury statutes and as to the propriety of the methods actually used by the jury boards in this State in selecting grand jurors.

In Chestnut v. The People of the State of New York, 370 F. 2d 1, at 6-8 (2d Cir. 1966), cert. den. 35 U.S.L.W. 3366, April 18, 1967, the United States Court of Appeals for the Second Circuit sustained the remand of certain criminal cases to the State courts, sitting in New York County. The defendants had sought to remove these cases to the United States District Court on the grounds, inter alia, that the property requirements of Section 596 of the New York Judiciary Law and the broad discretionary powers with respect to selection of grand jurors vested in county clerks under Section 609(1) of that Law violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (These Federal constitutional issues are, of course, among those asserted by the present plaintiffs. The relevant statutes and the jury selection procedures are of course substantially identical in New York and Bronx Counties.)

In Chestnut, the decision to remand was based almost exclusively on the ground that "the alleged illegality of the New York County jury can be amply litigated in the state courts."

The United States Court of Appeals then went out of its way to indicate that the most serious doubts existed as to the constitutionality of the provisions of the New York Judiciary Law challenged by the appellants in the Chestnut case, and by the present plaintiffs. The relevant portions of the decision read:

> "It should be noted, however, that our conclusion that appellants have not met the requirements of § 1443(1) for removal to a federal tribunal at this juncture of the state's prosecution, is in no manner a determination by this Court that §§ 596 and 609 of the New York Judiciary Law are constitutional. We are confident that in light of recent decisions by the Supreme Court and federal appellate courts in other Circuits, that New York will give careful consideration to the very serious constitutional issues that appellants raise concerning the State's Grand Jury selection procedures.
>
> " ... The characterization in the State's brief ... of the appellants' attack on the validity of the Grand Jury as 'Quite obviously * * * a lot of nonsense' leads us to believe that the State does not appreciate recent developments in this area of the law." (370 F. 2d 1 at 6-7 and footnote 13)

The United States Court of Appeals further pointed out that convicted criminals who challenge the federal constitutionality of the state granting jury selection processes were only required first to exhaust their state remedies. Thereafter "the remedy of federal habeas corpus is freely available to them." Fay v. Noia, 372 U.S. 391. Moreover, if the trial in the state courts as to whether or not the state jury selection processes complied with the requirements of the Fourteenth Amendment involved "an unfair or deficient fact finding process," that iniquity can, after the exhaustion of state remedies, " ... be corrected by a federal court." City of Greenwood v. Peacock, 384 U.S. 808, at p. 829 (1966).

Hence, if the District Attorneys Association "has a practical concern" in securing an authoritative determination as to the constitutionality of the New York grand jury selection statutes and procedures, under present federal standards, it should join with the plaintiffs in opposing the defendants' motion to dismiss for lack of standing to sue and in securing a determination of the substantive issues posed by the complaint herein.

POINT II

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE FIRST, SECOND, FIFTH AND SIXTH CAUSES OF ACTION SHOULD BE GRANTED

The gist of the first, second, fifth and sixth causes of action is the claim of the unconstitutionality of the present statutory requirement that each grand and petit juror must own in his own right $250.00 worth of property (or have a spouse who owns such property). This statutory requirement is set forth *in haec verba* in Section 596(3) of the Judiciary Law. Each of the causes of action alleges that defendant Hanley, as County Clerk of the Bronx, excludes from the grand and petit jury lists persons who do not meet this property requirement. The defendants have not denied these allegations. (See p. 4, District Attorneys' Brief.)

There is no dispute of fact as to the language in Section 596 of the Judiciary Law. The defendant County Clerk has conceded in his pleading, as pointed out above, that he complies with the law.* The first, second, fifth and sixth causes of action therefore clearly pose only a question of law, i.e., as to the constitutionality of Section 596(3) of the Judiciary Law which can and should be decided on a motion for summary judgment.

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* The District Attorneys' Brief (p. 14) makes the unsubstantiated statement that the Rodriguez record "indicates" that the

The Corporation Counsel and the New York State Attorney General, representing the defendants, concede, in their cross-motion for summary judgment, that the constitutionality of Section 256(3) of the Judiciary Law raises no issues of fact but purely of question of law, which should be decided at this time. The District Attorneys take an inexplicable contrary position, stating that "the record in this case does not * * * permit a determination by this Court as to whether or not the property requirement in Section 596 is unconstitutional on its face" (p. 15). The District Attorneys' position is based on the contention that systematic exclusion in the selection of jurors can be established only by showing that a definable class exists

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*(cont'd.) property requirement is disregarded in Bronx County. This position seems untenable in light of the defendant County Clerk's concession in his answer in the present case that he complied with the property requirement. Moreover, item 13 of the official questionnaire which all prospective jurors are required to fill out specifically calls for a detailed statement as to whether or not the prospective juror (or his wife) has sufficient property to comply with the statute. See Rule 17, Rules of the Jury System in the City of New York, reprinted in the Appendix to Vol. 29 of McKinney's Consolidated Laws of New York, p. 392 (1966 edition). In the Rodriguez case, the Chief Clerk of the Commissioner of Jurors of the Bronx County Clerk's office testified that all prospective jurors were asked whether they satisfied the property requirements of the statute. (Rodriguez record, pp. 250-1, 271-3).

in the community, which class is excluded from jury service as such. This contention is based upon cases, such as Hernandez v. Texas, 347 U.S. 475 (1954) and Thiel v. Southern Pacific Co., 328 U.S. 217, 220-1 (1945), in which, absent statutory discrimination, it was contended that certain definable groups existed in the community and were discriminated against in fact in the selection of jurors.

Obviously where the claim of discrimination is based upon alleged administrative action, not based upon or in violation of a statute, the parties speaking for the allegedly aggrieved group must first establish the existence of a definable class, which is allegedly being excluded from jury service. However, it is axiomatic that where legislation itself creates a class of persons who are excluded from jury service, the existence of that class need not be established, and the only question is whether the statutory exclusion is constitutionally proper or not.

Section 596(3) of the Judiciary Law creates a class of persons who are excluded from jury service, as such, i.e., all individuals who do not have $250.00 worth of property.*

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* The District Attorneys further contend (p. 14) that there are no persons in Bronx County who have less than $250.00 worth of

The only question is whether this exclusion is constitutionally permissible, or not. This issue of law can and should be decided on the pleadings.

The District Attorneys further contend (pp. 15-16) by citation of cases of general application, that the courts must presume the constitutionality of Section 596. It is well established, however, that there is no presumption as to the constitutionality of legislation which creates restrictions on citizenship rights or other civil liberties. See United States v. Carolene Products Co., 304 U.S. 144, 152-3 (1938).

The United States Supreme Court has just invalidated Virginia's poll tax, finding that it was a violation of equal protection to make affluence a standard for voting. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). By the same logic it is a violation of equal protection to make affluence a standard or prerequisite for jury service. See Chestnut v. People of State of New York, 370 F. 2d 1, 7 (C.C.A. 2d, 1966);

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* (cont'd.) property. Such contention is directly contradicted by the affidavits of the prospective intervenors, McClain, The Congress of Racial Equality and The National Association for Puerto Rican Civil Rights, submitted in support of their motions for leave to intervene, which stand unchallenged on the present record.

Labat v. Bennett, 365 F. 2d 698 (C.C.A. 5th, 1966). The older rulings sustaining Section 596(3) of the Judiciary Law and the other challenged provisions of the New York State Statutes have lost their validity and must no longer be followed. As has been stated, ". . . our highest court has adopted a new ruling . . . and such new ruling, being in effect a reversal of its earlier decision, is both controlling and compelling on this court in the instant application." Kelly-Sullivan, Inc. v. Moss, 174 Misc. 1098, 22 NYS 2d 491, at 500 (1940).

The final plea in abatement by the District Attorneys is that the Rodriguez decision has foreclosed judicial inquiry into the constitutionality of Section 596(3), under the doctrine of stare decisis. This argument is inapposite, for the Rodriguez decision does not discuss the constitutionality of this section at all.

The plain fact is that the pleadings herein raise no issue of fact as to the first, second, fifth and sixth causes of action. The only issue before the Court with respect to these causes of action is the constitutionality of Section 596(3) of the Judiciary Law. This is precisely the kind of issue which can and should be decided upon the present cross-motions for summary judgment.

POINT III

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE THIRD CAUSE OF ACTION SHOULD BE GRANTED.

The gist of the third cause of action is the claim that the vague statutory specifications of eligibility for jury service, contained in Section 596(6) of the Judiciary Law, coupled with the direction in Section 609 that the County Clerk shall make "special investigation of persons" qualified for service, give the defendant Hanley the absolute right to decide, in his sole discretion, the persons who "are suitable to serve as grand jurors" in Bronx County. It is contended that both the vagueness and imprecision of the state statute and the arbitrary powers vested in the County Clerk violate the equal protection clause of the Fourteenth Amendment. See Louisiana v. United States, 380 U.S. 145 (1965); Chestnut, supra, n. 13 at p. 7.

It is true that the Answer herein contains a denial that the defendant County Clerk exercised his latitudinarian powers arbitrarily. However, it cannot be denied that the New York statutes condition eligibility for service on grand juries, upon standards so vague that they require highly subjective interpretations to be made in each case by the officials responsible for the initial selection, i.e., the employees of the Commissioner of Jurors in the office of the various county clerks. The question as to whether or not the Fourteenth Amendment permits administrative officials to be empowered to condition the exercise of "fundamental rights of citizenship,"* guided only by such ambiguous legislative standards, poses only an issue of law. Hence, the third cause of action presents the classic instance of an issue which should be decided upon a motion for summary judgment.

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* See Strauder v. West Virginia, 100 U.S. 303 (1880).

POINT IV

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE FOURTH CAUSE OF ACTION MUST BE DENIED; THE ISSUES RAISED THEREIN CAN ONLY BE DECIDED BY TRIAL

The fourth cause of action states that Section 609 of the Judiciary Law must be construed so as to comply with the latest federal cases interpreting the Fourteenth Amendment to the United States Constitution. Accordingly, Section 609 must be read so as to require that lists of persons for inclusion on grand jury panels be prepared annually, in such a manner as to represent a reasonable cross-section of the community, selected at random, without exclusion of or mere token representation of particular economic, social or other groups.

Plaintiff alleges that this necessary construction of Section 609 is disregarded by defendant Hanley. It is contended that the last and current annual lists of persons submitted by said defendant to the County Jury Board of the Bronx systematically exclude Negroes and Puerto Ricans, except for the token inclusion of small numbers of Negroes and Puerto Ricans of upper economic and social class. Defendant further alleges that the last and current annual lists prepared by defendant Hanley systematically exclude (or provide only for token inclusion of) day wage earners, indigents and young persons.

These allegations of the fourth cause of action are all denied by the defendants. Accordingly, it is plain that the fourth cause of action raises issues of fact which can only be resolved upon a trial. In this connection, it should be noted that the District Attorney's Brief concedes Section 609 must be applied in the manner set forth in the fourth cause of action (P. 7). The only issue is whether or not the County Jury Board for the Bronx complies with this legal requirement.

The District Attorneys contend, however, that this issue has or may have been resolved by Judge Carney's decision in the Rodriguez case, supra. It is respectfully submitted that this contention is fallacious. In the first place, Judge Carney's decision held only that no discrimination had been practiced in the selection of Puerto Ricans for jury service in the Bronx. Judge Carney did not purport to rule upon the issues -- raised in the fourth cause of action in the present complaint -- that there was systematic discrimination in the Bronx, which resulted in exclusion or only token inclusion on grand jury panels of Negroes, day wage earners, indigents and young persons.

Secondly, Judge Carney held that Rodriguez was not a Puerto Rican and was not (or might not be) entitled to contend that Puerto Ricans were excluded from grand jury service. No such barrier may be asserted against the prospective intervenor, The National Association For Puerto Rican Civil Rights.

Thirdly, Judge Carney found that Rodriguez had not established that "there was a definable class in Bronx County known as Puerto Rican"; accordingly, no proof could be adduced as to discrimination against the class, whose existence had not been established. Regardless of the limitations of Rodriguez' proof, the evidence of the ordinary citizen's eyes and ears establishes that Puerto Ricans in fact are an identifiable group in the community.

The record in the Rodriguez case (which we have been able to examine, through the courtesy of the Bronx County District Attorney) reveals a dispute between the witnesses for the District Attorney and for the defendant therein as to whether Puerto Ricans were 20 or more than 25% of the whole population of Bronx County. The exact percentage of Puerto Ricans is irrelevant, for present purposes. Whether the percentage be 20 or 25%, or larger, the very cases cited by the District Attorney demonstrate that the presence of such a large group of individuals, with identifiable linguistic and other characteristics differing from that of the remainder of the community, constitutes a separate class. [State v. Lopez, 182 Kan. 46, 318 P. 2d 662, 665-6 (1957); *Ramirez* v. *State,* 293 S.W. 2d 653, 654-5 (Tex. Cr. App. 1956)].

The testimony at the *Rodriguez* hearing of Millie King, Chief Clerk of the Commissioner of Jurors of the Bronx County Clerk's office, (pp. 250, et seq.) shows that the percentage of Puerto Ricans who serve on the current Bronx County grand jury venire is very much less than the lowest statements as to the percentage of Puerto Rican population in the entire county. It has been authoritatively held that such a discrepency creates presumption of discrimination. In *Rabinowitz* v. *United States*, 366 Fed. 2d 34 (C.C.A. 5th 1966), the United States Court of Appeals rejected the contention that jury commissioners had not specifically intended to exclude Negroes from juries. The language of the Court is pertinent to the issue at bar. "The jury commissioners must be held to have intended the natural result which flowed from their conduct. * * * The Constitution and laws of the United States place an affirmative duty on the court clerk and the jury commissioner to develop and use a system that will probably result in a fair cross-section of the community being placed on the jury rolls." Id. at 57 (footnote omitted).

Indeed, Miss Kings' testimony in the *Rodriguez* case clearly establishes illegal discrimination against at least two classes of persons:

1. She testified that women are not called for service on grand juries in Bronx County (p. 261,267) in the allegedly random selection of jurors.

Women, of course, are entitled to disqualify themselves from jury service (Sec. 599[7] of the Judiciary Law), but this is no basis for the unconstitutional act of not calling them in the first instance.

2. Miss King further testified that it was "an office rule" in Bronx County that no person could qualify to serve on a grand jury unless he had at least one service (and preferably more) on a petit jury.

Neither species of discrimination is permitted by the Fourteenth Amendment.

The District Attorney's brief further implies that the issues raised by the fourth cause of action may have been disposed of by the federal decisions in United States v. Greenberg, 200 F. Sup. 382 (S.D. N.Y., 1961); United States v. Bowe, 360 F. 2d 1, at 6-7 (2d Cir. 1966) and United States v. Kelly, 349 F. 2d 720, 777-778 (2d Cir. 1965). These federal cases are irrelevant. Their holding is simply that the use of the New York State voter registration lists as a basic source for selecting jurors to serve in the United States District Court for the Southern District of New York is not unconstitutional, since there is no showing nor reason to believe that discrimination exists in the enrollment of voters. But it should clearly be noted that the $250 property requirement embodied in Sec. 596 of the Judiciary Law is not followed in the federal courts. Similarly, the complaints in the Greenberg, Bowe and Kelly cases did not allege that factual discrimination was practiced in the selection of grand jury panels against Negroes, Puerto Ricans or any other group of persons, as such. Moreover, all of these cases related to the selection of federal, and not Bronx County, juries.

The District Attorney's brief concluded its reference to the fourth cause of action by stating that unless "the defendants' motion to dismiss" on procedural grounds is granted, "a hearing should be ordered to determine the issues raised by the pleadings." Plaintiffs agree.

CONCLUSION

Plaintiffs' motion for summary judgment on the first, second, third, fifth and sixth causes of action should be granted. Defendants' motion for summary judgment on all causes of action should be denied. A hearing should be ordered to determine the issues raised by the pleadings in the fourth cause of action.

Respectfully submitted,

LANS & FINK, ESQS.
360 Lexington Avenue
New York, N. Y.

CARL RACHLIN, ESQ.
150 Nassau Street
New York, N. Y.

Attorney for original Plaintiff
and prospective intervening
Plaintiffs

Asher Lans, Esq.
Carl Rachlin, Esq.
Stephen J. Feinberg, Esq.,
of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- -X

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

- -X

NOTICE OF MOTION TO INTERVENE

Index Number 5401/1966

SIRS:

PLEASE TAKE NOTICE, that on the annexed affidavits of CHARLES S. McCLAIN, NATHAN STRAUS and STEPHEN J. FEINBERG, Esq. sworn to the 8th day of September, 1966, the verified complaint herein, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Special Term, Part I, at the Courthouse thereof, on the 13th day of September, 1966, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order pursuant to §1013, Civil Practice Law and Rules, permitting CHARLES S. McCLAIN, the movant herein, to intervene in the within action, on the ground that movant is personally aggrieved by the wrongful and illegal acts alleged in the complaint and the movant's interest may not be adequately represented by the present parties, and directing that the said CHARLES S. McCLAIN be added as a party plaintiff, and granting the plaintiffs permission to file an amended complaint adding CHARLES S. McCLAIN, the Congress of Racial Equality and the National Association for Puerto Rican Civil Rights as plaintiffs and adding the additional factual information to the complaint to reflect the addition of the new plaintiff in this action, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
September 8, 1966

Yours, etc.,

LANS & FINK, Esqs.
Attorneys for Nathan Straus,
Charles S. McClain and the
National Association for the
Puerto Rican Civil Rights
360 Lexington Avenue
New York, N. Y. 10017

CARL RACHLIN, Esq.
Attorney for the Congress of
Racial Equality
200 West 135th Street
New York, N. Y.

TO:

J. LEE RANKIN, Esq.
Attorney for Defendants
Corporation Counsel for
the City of New York
Municipal Building
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Attorney General, State of New York
80 Centre Street
New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- -X

NATHAN STRAUS,

Plaintiff,

-against-

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

- -X

AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE

STATE OF NEW YORK)
) ss.:
COUNTY OF BRONX)

CHARLES S. McCLAIN, being duly sworn, deposes and says:

1. I reside at 722 Rosedale Avenue, Bronx, New York.

2. I am over twenty-one years of age and am unmarried. I am a Negro.

3. I have read the complaint in the action brought by NATHAN STRAUS in the Supreme Court of the State of New York, County of the Bronx, against the County Clerk in Bronx County and the Comptroller of the City of New York in which Mr. STRAUS challenges the provisions of the New York Laws which require a person to be the owner of property of at least $250.00 in order to be eligible to serve as a juror or grand juror. In the same action Mr. STRAUS claims that there is discrimination against Negroes, Puerto Ricans, young people and people of limited

means in the selection of jurors.

4. I belong to each of the disqualified classes. I am a Negro, I am young and I have little money. I have no assets except for my clothing and a ring worth about $100.00. I am not presently employed. I feel that I am well qualified to serve as a juror. I had not completed school when I went into the Service. I am now planning to re-enter school, having received my Honorable Discharge from the Army after two years of service which included nine months of active duty in Viet Nam. I have during that time become greatly appreciative of the Democratic Processes and the importance of trial by an impartial jury. I am striving to become an informed voter and hope to take full advantage of all my rights and obligations as an American Citizen.

5. I feel that the right and obligation of every American, young and old alike, to serve as a juror is one of the fundamental rights and obligations of our society. One never knows when he will be the one accused and the one desirous of a fair and impartial trial by his peers.

6. Yet, I may not serve as a juror merely because I am not possessed of sufficient property.

7. My reading of the complaint makes it clear that I

will not be asked to serve as a grand juror even if some day I do acquire sufficient property, because grand jurors are not selected at random but in such a manner that certain persons tend to serve time and again as grand jurors, while others are never given an opportunity to qualify, with the result that young people and certain minority groups, including Negroes, are systematically given token representation.

8. No one asked me when I was inducted into the Army whether I was a Negro, or how much money I had, or how much money my parents had. The United States Army was a cross section of all of the people. I had been taught throughout my years in school that equality and democracy were practiced in the United States, regardless of one's skin color or economic means. I think the grand jury like the Army should be made up of representatives of the entire community and not of selected groups. I am anxious to join in this law suit.

9. I think that the Constitution of the United States guaranties me and all persons similarly situated equal protection of the laws.

10. I have consulted with NATHAN STRAUS, the plaintiff in this action, concerning my joining with him as a plaintiff. He informs me that he would be pleased to have me join with him. Indeed I have a more personal stake in this suit than Mr. STRAUS. He is eligible to serve as a juror and grand juror, I am not.

He does not belong to the minority groups which are discriminated against, I do.

11. I therefore request this Court to permit me to intervene and join Mr. STRAUS as a plaintiff in this action, and to permit us to amend the complaint so as to reflect the factual changes brought about by my addition as a plaintiff. I attach hereto a copy of the proposed amended complaint.

Charles McClain
CHARLES S. McCLAIN

Sworn to before me this
8th day of September, 1966.

Stephen J. Feinberg
STEPHEN J. FEINBERG
NOTARY PUBLIC, STATE OF NEW YORK
No. 60-1181810
Qualified in Westchester County
Cert. filed in New York County
Commission Expires March 30, 1967

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

- -X

NATHAN STRAUS, CHARLES S. McCLAIN, THE CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS,

Plaintiffs,

AMENDED COMPLAINT

-against-

JOHN J. HANLEY, County Clerk of Bronx County, and MARIO A. PROCACCINO, Comptroller of the City of New York,

Defendants.

- -X

Plaintiffs, NATHAN STRAUS, CHARLES S. McCLAIN and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS, complaining of defendants, by LANS & FINK, their attorneys, and plaintiff THE CONGRESS OF RACIAL EQUALITY, complaining of defendants, by Carl Rachlin its attorney, allege:

AS AND FOR A FIRST CAUSE OF ACTION:

1. Plaintiff, NATHAN STRAUS, is a citizen of the United States of America and of the State of New York, a resident of the State of New York and a taxpayer of the County of the Bronx, City of New York. Plaintiff NATHAN STRAUS is assessed upon property in the said County of the Bronx, City of New York in assessed amounts exceeding $1,000.00 and is liable to pay taxes to such City on such assessments upon property owned by him in said City.

2. Plaintiff, CHARLES S. McCLAIN, is a citizen of the United States of America, a resident of the State of New York, County of the Bronx. CHARLES S. McCLAIN is unmarried and is a Negro. CHARLES S. McCLAIN is eligible to serve as a grand juror in the County of Bronx pursuant to the laws of the State of New York except that he does not meet the property requirements of Section 596 of the Judiciary Law, and he is among the class of persons entitled to eligibility to serve as a grand juror under the Constitution of the United States of America.

3. Plaintiffs, THE CONGRESS OF RACIAL EQUALITY and THE NATION ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS are Organizations having many hundreds of members residing in the County of Bronx and bring this action as representatives of such Negro and Puerto Rican members. All of such members of the NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS and thousands of such members of THE CONGRESS OF RACIAL EQUALITY are within the class of persons whose eligibility to serve as grand jurors in the County of Bronx is being wrongfully, improperly and unconstitutionally restricted as hereinafter alleged.

4. Defendant JOHN J. HANLEY is and at all times hereinafter mentioned was the County Clerk of the County of Bronx, City and State of New York. The defendant MARIO A. PROCACCINO is the Comptroller of the City of New York.

5. Defendant HANLEY, as County Clerk of the County of Bronx, is a member of the County Jury Board of Bronx County pursuant to Sectinn 591 of the Judiciary Law of the State of New York. In accordance with Section 609 of the Judiciary Law of the State of New York, said County Clerk is required to make a list of persons who "are suitable to serve as grand jurors," in accordance with qualifications set forth in said Law and

after he has made a "special investigation" of said prospective jurors. The Annual Grand Jury List for the County of Bronx is made up by the Bronx County Jury Board, in accordance with Section 609 of the Judiciary Law of the State of New York, from the schedule of suitable grand jurors, prepared, as aforesaid, by defendant HANLEY. On information and belief, grand jurors serving in the County of Bronx have been paid and will in the future be paid by the City of New York, through vouchers and checks executed, authorized and approved by defendant, MARIO A. PROCACCINO, as Comptroller of the City of New York.

6. Section 596 of the Judiciary Law of the State of New York provides, among other things, that an individual must be (or his or her spouse must be) "the owner, in his or her own right, of real or personal property of the value of Two Hundred and Fifty Dollars" in order to qualify as a juror, in any County located in the City of New York.

7. On information and belief, defendant HANLEY, as County Clerk of the County of Bronx, in his questionnaire presented to prospective grand jurors, and in accordance with the above cited provisions of Section 596 of the Judiciary Law of the State of New York inquires, as to whether said prospective grand jurors satisfy the aforesaid property requirements. (Questionnaire, Judiciary Law Rules, Rule 17, Question 13).

8. Upon information and belief, defendant HANLEY as County Clerk of the County of the Bronx, excludes from the list

of persons whom he certifies to the County Jury Board of Bronx County, from which list such Board prepares the Annual Grand Jury list, individuals who do not own property as set forth in paragraph 6 hereof.

9. Plaintiff, CHARLES S. McCLAIN, does not own property, real or personal, sufficient to satisfy the property requirement for jury service as set forth in paragraph 6 hereof. Many of the members of THE CONGRESS OF RACIAL EQUALITY and of THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS do not with their spouse if they have them own property, real or personal, sufficient to satisfy the property requirement for jury service as set forth in paragraph 6 hereof.

10. The provisions of Section 596 of the Judiciary Law making the possession of property a prerequisite to qualification to serve as a grand juror in those Counties which are located within the City and State of New York, the practice of defendant HANLEY, as County Clerk of the County of Bronx, in inquiring into the property possessed by prospective grand jurors, and the practice of defendant HANLEY in failing and refusing to include in the list of persons eligible to serve as grand jurors individuals who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars deprives persons not having such property of the right to serve upon grand juries and deprives prospective defendants of liberty, "without due process of Law" and denies such persons " the equal

protection of the laws", by State and Municipal action, in violation of the Fourteenth Amendment to the Constitution of the United States.

11. Plaintiff NATHAN STRAUS has duly made and executed a surety bond to the defendants herein in the penal sum of Two Hundred and Fifty Dollars and conditioned to pay all costs that may be awarded the defendants in this action if the Court shall finally determine the same in favor of the defendants, and said bond has been duly approved by Hon. NATHANIEL T. HELMAN, Justice of the Supreme Court of the County of Bronx, said bond has been duly filed by said NATHAN STRAUS in the Office of the Clerk of the County of Bronx.

12. As a result of the illegal exclusion from grand juries in the County of the Bronx of plaintiff, CHARLES S. McCLAIN, many members of THE CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS and other persons who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars, as described in the preceding paragraphs of this First Cause of Action, CHARLES S. McCLAIN, many members of the CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS and other persons, have been and are being wrongfully, illegally and unconstitutionally deprived of their right to be eligible to serve as grand jurors and the entire composition of grand juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitution of the United States. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful payment of substantial

amounts of money, for compensation to petit and grand jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons indicted by such illegally constituted grand juries may or will have the right to have their indictments quashed on the grounds that such grand juries were illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional grand jury and petit jury proceedings, as well as causing other considerable expenses to the City of New York.

AS AND FOR A SECOND CAUSE OF ACTION:

13. Plaintiffs repeat and reallege paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11 of the complaint herein with the same force and effect as if fully set forth herein.

14. The provisions of Section 596 of the Judiciary Law making the possession of property a prerequisite to qualification to serve as a grand juror in those counties which are located within the City and State of New York, and the practice of defendant HANLEY in failing and refusing to include in the list of persons eligible to serve as grand jurors, plaintiff, CHARLES S. McCLAIN, and other individuals who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars deprive persons not having such property of the right to serve upon grand juries and deprive prospective defendants of life and liberty, all "without due process of law", and deprives such persons of "the equal protection of the laws of this state," all in violation of Sections 6 and 11 of Article 1 of the Constitution of the State of New York.

15. As a result of the illegal exclusion from grand juries in the County of the Bronx of plaintiff, CHARLES S. McCLAIN, many members of the CONGRESS OF RACIAL EQUALITY and of the NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS, and other persons who (or whose spouses) do not own pSoperty of the value of Two Hundred and Fifty Dollars, as described in the preceding paragraphs of this Second Cause of Action, the entire composition of grand juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitution of the State of New York. CHARLES S. McCLAIN, many members of the CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS and other persons, have been and are being wrongfully, illegally and unconstitutionally deprived of their right to be eligible to serve as grand jurors. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful expenditure and payment of substantial amounts of money, for compensation to petit and grand jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons indicted by such illegally constituted grand juries may or will have the right to have their indictments quashed on the grounds that such grand juries were illegally and improperly constituted, thereby causing great cost and expense to the City

of New York in terms of additional grand jury and petit jury proceedings, as well as other judicial expense.

AS AND FOR A THIRD CAUSE OF ACTION:

16. Plaintiffs repeat and reallege paragraphs 1 to 5 inclusive and 11 of the complaint herein with the same force and effect as if fully set forth herein.

17. Defendant HANLEY, as County Clerk of the County of Bronx is required, by Section 609 of the Judicial Law of the State of New York, to "make special investigation of persons qualified to serve as trial jurors". Said defendant is further required, after making such investigation and after eliminating the names of persons convicted of felonies and of misdemeanors involving moral turpitude, to "...make a list of those persons who... are suitable to serve as grand jurors...The list shall contain the names of at least the maximum number of persons permitted for the annual grand jury list. The annual grand jury lists shall be selected therefrom by the respective county jury boards."

18. Pursuant to Rule 21 of the Rules of the Jury System in the City of New York, adopted by the justices of the Appellate Division of the Supreme Court in the first and second judicial departments, acting jointly, the annual grand jury list for the County of the Bronx is required to consist of "not less

than five hundred nor more than one thousand". However, said annual grand jury list for the County of the Bronx, pursuant to Section 609 of the Judiciary Law of the State of New York, must be constituted from a list of "suitable" persons prepared by defendant HANLEY, as County Clerk of the County of the Bronx.

19. Section 596 of the Judiciary Law of the State of New York which lists qualifications for service as a juror, including as a grand juror, in any County in the City of New York, states among the requirements that "a person must...be intelligent; of sound mind and good character; well informed...", in addition to provisions requiring a juror "to be in the possession of his natural faculties" and not to have been convicted of specified types of crimes.

20. The requirements that a grand juror must be "intelligent; of sound mind and good character;" "well informed" are so vague and imprecise that they give the defendant HANLEY, as County Clerk of the Bronx, the absolute right to decide, in his sole discretion, the persons who "are suitable to serve as grand jurors" in the County of the Bronx, for the purposes of Section 609 of the Judiciary Law. Hence the above cited provisions of Section 596 of the Judiciary Law deprive persons whose qualifications are not deemed by such County Clerk to be satisfactory of the right to serve upon grand juries and therefore deprive such persons and persons who may be indicted by such improperly constituted grand juries of life and liberty," without due process of law" and in derogation of "the equal protection of the laws," by State action, in violation of the Fourteenth Amendment to the Constitution of the United States,

and deprive such persons of life and liberty, "without due process of law" and in denial of "the equal protection of the laws of this State," in violation of Sections 6 and 11 of Article 1 of the Constitution of the State of New York.

21. As a result of the arbitrary power, described in the proceeding paragraphs of this Third Cause of Action, given to defendant HANLEY, as County Clerk of the Bronx, to decide the persons who are suitable to serve on grand juries and therefore to determine the composition of the annual grand jury list, the entire composition of grand juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Fourteenth Amendment to the Constitution of the United States and Sections 6 and 11 of Article 1 of the Constitution of the State of New York. CHARLES S. McCLAIN, many members of the CONGRESS OF RACIAL EQUALITY and the NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS and other persons, have been and are being wrongfully, illegally and unconstitutionally deprived of their right to be eligible to serve as grand jurors. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful expenditure and payment of substantial amounts of money, for compensation to petit and grand jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons indicted by such illegally constituted grand juries may or will have the right to have their indictments quashed on the grounds that such grand juries were illegally and improperty constituted, thereby

causing great cost and expense to the City of New York in terms of additional grand jury and petit jury proceedings, as well as other judicial expenses.

AS AND FOR A FOURTH CAUSE OF ACTION:

22. Plaintiffs repeat and reallege paragraphs 1 to 5 inclusive, 11 and 18 of the complaint herein with the same force and effect as if fully set forth herein.

23. Defendant HANLEY, as County Clerk of the County of Bronx, is required by Section 609 of the Judiciary Law of the State of New York to "make special investigation of persons qualified to serve as trial jurors" and from such investigation, after eliminating the names of persons convicted of felonies and of misdemeanors involving moral turpitude, to "make a list of those persons who... are suitable to serve as grand jurors... The list shall contain the names of at least the maximum number of persons permitted for the annual grand jury list. The annual grand jury lists shall be selected therefrom by the respective county jury boards."

24. The provisions of the Fourteenth Amendment to the United States Constitution to the effect that no State shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" require that the lists of

persons from whom grand jurors are selected constitute a reasonable cross section of the community, selected at random, without exclusion or token representation of particular economic, social or other groups, and subject only to reasonable exclusions because of occupation, competence or age, not permitting personal choice by the public officials making the actual selection of persons eligible to serve on grand jury lists or who are selected to serve as grand jurors, except on a random basis.

25. The Constitution of the State of New York provides in part as follows:

"No person shall be held to answer for a capital or otherwise infamous crime...unless on indictment of a grand jury..." (Article 1, Section 6)

"No person shall be deprived of life liberty or property without due process of law" (Article 1, Section 6)

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof." (Article 1, Section 11)

"In addition to their powers and duties as clerks of the Supreme Court, they (the clerks of counties in the City of New York) shall have power to select, draw, summon, and empanel grand and petit jurors in the manner and under the conditions now or hereafter prescribed by law...." (Article 13, Section

13 (a))

The above quoted provisions of the Constitution of the State of New York require that the list of persons from whom grand jurors are selected constitute a reasonable cross section of the community, selected at random, without exclusion of or token representation of particular economic, social or other groups, and subject only to reasonable exclusions because of occupation, competence or age, and do not permit personal choice by the public officials making the actual selection of persons eligible to serve on grand jury lists or who are selected to serve as grand jurors.

26. Section 609 of the Judiciary Law of the State of New York complies with the provisions of the United States and New York State Constitutions cited in paragraphs 22 and 23 of this complaint, only if it requires (and it must be construed so as to require) the defendant HANLEY, as County Clerk of the County of the Bronx, in making the list of persons who "are suitable to serve as grand jurors," for submission to the County Grand Jury Board, to select at random a list from the persons who meet the constitutional legal requirements for such services, which such list is drawn from a reasonable cross section of the entire population of the Bronx, without exclusion or token representation of any economic, social or other groups and without the application of arbitrary personal standards in the inclusion or exclusion of particular persons in the list of

individuals, who are designated as "suitable to serve as grand jurors."

27. Upon information and belief, the defendant HANLEY, as County Clerk of the County of the Bronx, has failed and continues to fail to make an investigation to determine the names of all or a majority or even a substantial minority of those persons who "are suitable to serve as grand jurors" and who meet the legal requirements for such service in the County of the Bronx or to make a list of such persons by selection at random, or to select a list of persons who "are suitable to serve as grand jurors", in such manner as to represent a reasonable cross section of the population of the Bronx as a whole, without exclusion or token representation of economic, social or other groups or without exclusion or inclusion of specific persons in such list, based upon application of arbitrary personal standards.

28. Upon information and belief, the defendant HANLEY, as County Clerk of the Bronx, in making his last and his current annual list of persons who are suitable to serve as grand jurors, for submission to the County Jury Board of the Bronx, included therein only the names of a select group of persons, who had previously been investigated and qualified by him, and who had served as grand jurors for many prior years, together with the names of persons who had volunteered for grand jury service. The defendant HANLEY therefore failed to meet the above cited constitutional and statutory requirements of selecting a list

of persons who "are suitable to serve as grand jurors" in such manner as to represent a reasonable cross section of the population of the Bronx as a whole, without exclusion or token representation of economic, social or other groups and without exclusion or inclusion of specific persons based upon the application of arbitrary personal standards.

29. Upon information and belief, the defendant HANLEY, as County Clerk of the Bronx, in making his last and his current annual list of persons who are suitable to serve as grand jurors, for submission to the County Jury Board of the Bronx, failed to comply with the above cited constitutional and statutory requirements, in that said defendant failed to make a list selected at random from the whole population of the Bronx, with only reasonable exclusions of classes of persons or specific individuals, based upon occupation, competence or age.

30. Upon information and belief, the method, described in paragraph 28 of this complaint, which has been and is utilized by defendant HANLEY, in making a list of persons "who are suitable to serve as grand jurors" for submission to the County Jury Board of the Bronx, has led and leads, in the last past and the current annual grand jury list, to the systematic exclusion of Negroes and Puerto Ricans, except for the token inclusion of small numbers of Negroes and Puerto Ricans of upper economic and social class, and also leads to the systematic exclusion (or token inclusion) of day wage earners, indigents and young

persons. The great majority of individuals, who are repeatedly and deliberately included by defendant HANLEY in the lists of those he certifies to the County Jury Board of the Bronx as being "suitable to serve as grand jurors" are white persons in the upper income brackets, who are self employed or who hold managerial or professional positions or who have retired from such posts.

31. Upon information and belief, because of the systematic exclusion (or token inclusion) of Negroes and Puerto Ricans (except those of upper economic and social status) and of day workers, indigent and young persons from the annual grand jury lists of CHARLES S. McCLAIN, many members of the CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS, and other persons have been and are being wrongfully, illegally and unconstitutionally deprived of their right to be eligible to serve as grand jurors and the present annual grand jury list and the Grand Jury panels as presently actually established in Bronx County, are so constituted that there is a substantial probability that such grand jury panels will have prejudice or bias against Puerto Ricans and Negroes (except for those of upper economic and social status) and against day workers and indigent persons, in violation of the provisions of the Constitutions of the United States and of the State of New York, cited in paragraphs 24 and 25 of this complaint.

32. As a result of the unconstitutional methods employed by the defendant HANLEY, as County Clerk of the Bronx, in selecting for submission to the County Jury Board the list of persons who "are suitable to serve as grand jurors", as such

methods have been described in the preceding paragraphs of this Fourth Cause of Action, the entire composition of grand juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitutions of the United States and of the State of New York. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful expenditure and payment of substantial amounts of money, for compensation to petit and grand jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons indicted by such illegally constituted grand juries may or will have the right to have their indictments quashed on the grounds that such grand juries were illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional grand jury and petit jury proceedings, as well as other judicial expenses.

AS AND FOR A FIFTH CAUSE OF ACTION:

33. Plaintiffs repeat and reallege paragraphs 1 to 5 inclusive, and 11 of this complaint as fully as if set forth herein.

34. Section 596 of the Judiciary Law of the State of New York provides, among other things, that an individual must be (or his or her spouse must be) "the owner, in his or her own right, of real or personal property of the value of Two Hundred

and Fifty Dollars" in order to qualify as a juror, in any County located in the City of New York.

35. The provisions of Section 596 of the Judiciary Law, making the possession of property a prerequisite to qualification to serve as a petit juror in those Counties which are located within the City and State of New York, deprive plaintiff, CHARLES S. McCLAIN, many members of the CONGRESS OF RACIAL EQUALITY and of THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS, and other persons who or whose spouses do not have such property of the right to serve upon petit juries and deprive prospective defendants of life and liberty, all "without due process of law" and in derogation of "the equal protection of the laws", by State action, in violation of the Fourteenth Amendment to the Constitution of the United States.

36. As a result of the illegal exclusion from petit juries in the County of the Bronx of plaintiff, CHARLES S. McCLAIN, many members of the CONGRESS OF RACIAL EQUALITY and of THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS, and other persons who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars, as described in the preceding paragraphs of this Sixth Cause of Action, the entire composition of petit juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitution of the United States. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful payment of the substantial amounts of money, for compensation to petit jurors and other costs and expenses

associated with the functioning of the judicial system, because of the fact that persons convicted by such illegally constituted petit juries may or will have the right to have their convictions set aside or vacated on the grounds that such juries were illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional petit jury proceedings, as well as other judicial expense.

AS AND FOR A SIXTH CAUSE OF ACTION:

37. Plaintiffs repeat and reallege paragraphs 1 to 5 inclusive, 11 and 34 to 36 inclusive, of the complaint herein with the same force and effect as if fully set forth herein

38. The provisions of Section 596 of the Judiciary Law making the possession of property a prerequisite to qualification to serve as a petit juror in those counties which are located within the City and State of New York, deprive plaintiff, CHARLES S. McCLAIN, many members of the CONGRESS OF RACIAL EQUALITY and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS and other persons not having such property of the right to serve upon petit juries and deprive prospective defendants of life and liberty, all "without due process of law" and deprives such persons of "the equal protection of the laws of this state," all in violation of Sections 6 and 11 of Article 1 of the Constitution of the State of New York.

39. As a result of the illegal exclusion from petit juries in the County of the Bronx of plaintiff, CHARLES S. McCLAIN, many members of the CONGRESS OF RACIAL EQUALITY and of THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS, and other persons who (or whose spouses) do not own property of the value of Two Hundred and Fifty Dollars, as

described in the preceding paragraphs of this Sixth Cause of Action, the entire composition of petit juries in the County of the Bronx has, is and will in the future be wrongful, illegal and in violation of the Constitution of the State of New York. Hence the City of New York has, is and will in the future become obligated to the illegal and wasteful expenditure and payment of substantial amounts of money, for compensation of petit jurors and other costs and expenses associated with the functioning of the judicial system, because of the fact that persons convicted by such illegally constituted petit juries may or will have the right to have their convictions set aside and vacated on the grounds that such petit juries were illegally and improperly constituted, thereby causing great cost and expense to the City of New York in terms of additional petit jury proceedings, as well as other judicial expense.

WHEREFORE, plaintiffs demand judgment as follows:

1. Against defendant HANLEY, as County Clerk of the County of Bronx, in the First, Second, Third and Fourth Causes of Action, enjoining said defendant from drawing grand jurors or from making any further lists of persons who are suitable to serve as grand jurors, in accordance with Section 609 of the Judiciary Law of the State of New York, or from taking any further action with respect to supplying replacements for the existing grand jurors, sitting within Bronx County or with respect to selecting new grand juries to sit within Bronx County,

until the discontinuance of the unconstitutional and illegal procedures for selection of persons who are suitable to serve as grand jurors, as such procedures are set forth in said causes of action.

2. Against defendant HANLEY, as County Clerk of the County of the Bronx, in the Fifth and Sixth Causes of Action, enjoining said defendant from drawing any additional petit (trial) jurors, to serve on petit (trial) jury panels in the County of the Bronx until the discontinuance of the unconstitutional and illegal procedures for selection of persons as petit (trial) jurors, as such procedures are set forth in said Causes of Action.

3. In all Causes of Action, enjoining defendant PROCACCINO, as Comptroller of the City of New York, from authorizing or making any further payments for service to grand or petit jurors, until the discontinuance of the illegal and unconstitutional procedures, set forth in this complaint, for selection of persons who are suitable to serve as grand jurors and for selection of petit jurors.

4. Together with such other and further relief as to the court may seem just and proper, together with the costs and disbursements of this action.

LANS & FINK, Esqs.
Attorneys for Plaintiffs NATHAN STRAUS, CHARLES S. McCLAIN and THE NATIONAL ASSOCIATION FOR PUERTO RICAN CIVIL RIGHTS
360 Lexington Avenue
New York, N. Y. 10017

TO:

J. LEE RANKIN, Esq.
Attorney for Defendants
Corporation Counsel for the City of New York
Municipal Building
New York, N. Y. 10007

LOUIS J. LEFKOWITZ, Esq.
Attorney for State of New York, Intervenor
Attorney General, State of New York
80 Centre Street
New York, N. Y.

CARL RACHLIN, Esq.
Attorney for the CONGRESS OF RACIAL EQUALITY
200 West 135th Street
New York, N. Y.

STUKES V. YOUTH AND ADULT CORRECTIONAL AGENCY OF CALIFORNIA, ET AL - CA
CORRESPONDENCE, 1966

[illegible] RE

[illegible] Society of Wisconsin

Please Retain Original Order

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT
OF CALIFORNIA NORTHERN DIVISION

Albert Stukes
PLAINTIFF

VS.

RICHARD A. MC GEE ADMINISTRATOR
YOUTH AND ADULT CORRECTIONAL
AGENCY OF CALIFORNIA, ET AL.,
DEFENDANTS

CIVIL NO.____________

CIVIL COMPLAINT

IN THE MOST HOLY NAME OF ALLAH-MASTER FARD MUHAMMAD- THE ALL WISE TRUE AND LIVING GOD, SOLE MASTER OF THIS FINAL DAY OF DESTRUCTION IN WHICH WE NOW LIVE,

AND IN THE NAME OF HIS LAST MESSENGER OUR LEADER AND TEACHER AND SPIRITUAL GUIED THE MOST HONORABLE ELIJAH MUHAMMAD: AS-SALAAM ALAIKUM:

Albert Stukes, plaintiff in this matter, being cognizant of, and under the pains and penalities of perjury, states:

He is an inmate of the california department of corrections, at Susanville, with the number of A-71791, is a said citizen of the United States and California; for the first time brings action against defendants, all in equity; and resides within the District of Jurisdiction of this Court.

This Court's jurisdiction is conferred by Title 28, section 1331 (a) and 1915 (d) United States Code, and Title II, section 204 (a) and 207 (a) of Public Law 88-352. This action is brought by plaintiff, suing in his own behalf, pursuant to the U. S. Code, Title 28, Section 1343 (1), (3) and (4), 2201 and 2281; Title 42 Sections 1981, 1983, c 22, Section 1, 17 State 13, and 1985; the United States Constitution Article 1, Section 10, Atricle 2, and Amendments 1, 5, and 14; and Public Law 88-352 (1964), Title II, Section 202, 203, and 204 (a), Title VI, Section 601, Title IX, Section 902; and Title XI, Section 1104.

AD DANMAM

Plaintiff accuses defendants of, and defendants are violating his Constitutional (Federal) rights in that they are denying, prohibiting, hindering, and refusing him: 1. FREEDOM OF RELIGION: 2. FREEDOM OF THE PRESS: 3. FREEDOM OF ASSOCIATION: 4. DUE PROCESS OF LAW: AND 5. EQUAL PROTECTION OF LAW:

Further the defendants are depriving Him of his Civil Rights as guaranteed under the United States Code Titles mentioned above and the Civil Rights Act of 1964.

Plaintiff is a Muslim, a member of the Lost and Found Nation of Islam, follower of the Honorable Elijah Muhammad. He is being denied Equal Protection of the Law in that every other faith is allowed within the Correctional Institutions. Moreover, facilities and supplies are provided for the other faiths and participation is encouraged by the State Agencies (See Chapter III, Article 7 of the rules of the Director of Corrections and of the Wardens Rules, Chapter IV, Articles, Section 0-4110-A). The Department of Corrections also singles out Muslims according to Administrative Bulletins 58/16 (2/25/58) and 61/40 (see enclosures one and two) the latter which is used to prohibit me from ordering books, ect., pertinent to Islam as taught by the Honorable Elijah Muhammad. Defendants have other policies the texts of which violated plainfiff's Civil and Constitutional Rights (when carried out) copies of which are unavailable to me.

The malicious acts of defendants grieves plaintiff and results in his suffering damage in the way of extreme psychological taxation, physiological control damage, permanent nervous disorders, religious indignities and humiliations, all which are irreparable, in the pusuit of his rights as provided under the Federal Constitution and Statutes and demands his damage in the form of Four-million, nine hundred thousand dollers. ($4,900,000).

Plaintiff further asserts thatpast, present and prospectives acts of depriving him of said rights leaving him of his rights leaves him in constant fear of his life, and that he has been and is being daily dishonored, shocked into hypertension solely because of the secondary acts of defendants which violates his rights as guaranteed in the United States Code and Public Laws and of this account asks and demands his damage in the sum of Nine-Hundred Thousand dollers ($900,000).

Defendants, being under oath to uphold the Constitution, Statutes and Laws of the Unites States, undoubtably know the provisions thereof, so in the acts complained of they must have acted upon malice aforethought and with vicious intent, which entitles plaintiff to punitive damages, which he asks in the sum of Seven-Hundred Thousand dollers ($700,000).

PRAYER

WHEREFORE PLAINTIFF PRAYS:

That this Honorable Court concur in that he has and is suffering actual damage due to the malicious acts of defendants who are acting in official capacities under the protection of State Statutes, ect., that such statutes, ect., be declared unconstitutional and void; thatbecause of said statutes, his rights be declared; and that an injuction or restraining order be issued to avail plaintiff to such rights;

PLAINTIFF FURTHER PRAYS:

That this Honorable Court order the defendants, who at this very moment are in the contempt of the U.S. Constitution, to pay the monies sought by plaintiff in the form of Five-Million, Eight-Hundred Thousand dollars actual damages, and Seven-Hundred Thousand dollars punitive damages, a sum total of Six-Million, Five-Hundred Thousand dollars, the assessments and disbursements incurred in this action and whatever other compansations and penalties this Court may deem just.

RESPECTFULLY SUBMITTED

____________________, 1966. ____________________

ENCLOSURE ONE

CHAPTER SIX

OTHER PROCEDURES FOR CLASSIFICATION COMMITTEE HANDLING

ARTICLE 1 - SPECIAL PROCEEDURES FOR MUSLIM INMATES ______________________________,

ADMINISTRATIVE BULLETIN 58/16 OF FEBRUARY 25, 1958

The presence in our institutions of a small group of inmates who adhere to quasi-religious doctrine referred to as MUSLIM,on who are members of the National Organization "Nation of Islam", has presented a management problem

In view of the foregoing the following steps shall be put into effect.

(a) AT THE RECEPTION GUIDANCE CENTERS: Correctional counselors preparing social evaluations shall be alert to the possibility of membership by inmates in the Muslim sect . Knowledge of such membership will often be gained upon routine inquiry as to religious preference. Scurtiny of official materials forwarded by the probation department and law enforcement agencies will, in other cases, indicate such affiliation. Requests to subscribe to the Pittsburgh Courier or the Amsterdam News should be screened as possible indications of interest in Muslimism. Where an inmate is definitely identified as afliated with the Muslim movement, this informations shall be indicated on the staff recommendation pages after the custodial remommendation, e.g.," Custody: close. Note Muslim affiliation." Where additional information concerning the extent or nature of subject's activities in the Muslim sect is available in the Reception*Guidance Center, it shall be evaluated in the Social Evaluation.

At the end of each month, the associate superintendents of the reception-guidance centers shall forward through channels to the departmental chief records officer the names and numbers of Muslims identified in processing.

(b) AT THE INSTITUTIONS: Upon the identification in the institution of members of the Muslim sect nor prevously identified, referrence to such identification with other pertinent information shall be reported on a chrono, CDC-128-B, a carbon copy of which shall be forwarded through channels to the department mental chief records officer. Earlier corespondence has resulted in the establishment of institutional list sent to the chief records officer. It is desired to bring these up-to-date.

THIS ENCDOSURE IS IN SUPPORT OF THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW CLAUSE IN WHICH THIS PLAINTIFF IS BEING DENIED JUST BECAUSE HE IS A MUSLIM. THIS BEING THE LAND OF THE FREE AND THE HOME OF THE BRAVE THIS PLAINTIFF FEELS THAT HE SHOULD HAVE THE SAME RIGHTS AS OTHER CITIZENS.

ENCLOSURE TWO

ADMINISTRATIVE BULLETINE NO. 61/40

SUBJECT: Islamic Literature

The policy of the Department of Corrections has always been to encourage inmate participation in recognized and responsible religious groups. Religious Literature, including the Koran has always been permitted in the institution. There has been some confusion created by the demands of the inmate members of the "Muslim" cult headed by Elijah Mohammad (A.K.A. Elijah Poole) for literature purporting to be Islamic in Nature, specifically the Koran of Quran, as well as various other publications issued by this group.

Moslemism (Mohammadism, Muslimism, Islam) is certainly a recognized major religion.

There is no objection to the purchase by inmates of ligitimate Islamic Literature such as is accepted by recognized Moslem leaders. However, literature published by Elijah Mohammad and his followers is not recognized as speaking for the Moslem faith and will not bepermitted in the institutions of the Department of Corrections.

STATE OF CALIFORNIA)
) SS:
COUNTY OF LASSEN)

PROOF OF SERVICE BY MAIL

I, Albert Stukes , being duly sworn, depose and say: That I am over the age of twenty-one (21) years; a citizen of the United States and a resident of Lassen County at Susanville Conservation Center, Susanville, Califonia, and sole party to the with in action or proceeding:

That I did this day submit for depositing in the United States Mails at the Post Office at Susanville with postage prepaid thereon, true copies of the within document for the following persons and that there is regular communication by mail between Susanville and these destinations;

Original and one (1) copies to;	United States Distkite Court Nothern Distkite of Calif. Nothern Division Sacramento, California
One copy to:	M.R. Schneckloth, Superintendent of Susanville Conservation Center
One copy to:	Inmate Albert Stukes
one copy to	Floyd McKissick 200 W. 135th Street Harlem, New York

I, Albert Stukes , declare under penalty of perjury that the foregoing is true and correct.

Dated this_____day of____________________1966.

Memo on Stukes Case

He is a Black Muslim in prison who claims that his 1st Amendment freedoms have been denied and seeks over $5 million in damages. He has sent us a copy of his filed complaint, proof of service by mail, and affidavit & motion to proceed in forma pauperis. He doesn't say for sure, but I presume that he wants us to represent him.

Recommendation Send letter asking him if he wants us to represent him.

Letter Written

November 22, 1966

Mr. Albert Stukes, #A-71791
California Department of Correction
Susanville, California

Dear Mr. Stukes:

We have received a copy of your civil complaint as well as your affidavit and motion in forma pauperis. It certainly appears from these documents that you have a justified complaint. ARe you asking us to provide legal assistance to you in this matter, or are you merely informing us of whatyou have done?

Yours truly,

Carl Rachlin
General Counsel

CR:ns

CDC-116-A

Name Albert Stukes #A-71791
Box No. 2210, California Conservation Center
Susanville, Calif.
Date November the 29th, 1966

Mr. Carl Rachlin
General Counsel
S.E.D.F.
150 Nassau Street
New York, N.Y. 10038

Dear Sir:

In answer to your letter of November 22, 1966. Yes, it is my desire that your office would assist me in this matter, as I am unskilled in the science of Law.

Your legal assistance would be appreciated; Please advice me of your answer at your earliest possible date!

Yours Truly,

Albert Stukes

Albeft Stukes
P.O.Box 2210, C.C.C.
Susanville, Calif.

TAITE, CHARLIE, L. VS. BUSBEE, W., CLYDE et al ESCAMBIA COUNTY, FLORIDA 1965-1967
(JOB DISCRIMINATION)

of Wisconsin

Please Retain Original Order

IN THE COURT OF RECORD OF ESCAMBIA
COUNTY, FLORIDA. IN CHANCERY.

FILED & RECORDED
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[illegible] OF RECORD
ESCAMBIA COUNTY, FLA.

CHARLIE L. TAITE,
Plaintiff,
vs.

COMP[illegible]

W. CLYDE BUSBEE, EDWIN L.
WALKER, and C. BROCK, as and
constituting the CIVIL SERVICE
BOARD OF ESCAMBIA COUNTY, FLORIDA,
PETER GINDLE and J. E. HALL, Chairman
and Superintendent, respectively, of
the BOARD OF PUBLIC INSTRUCTION OF
ESCAMBIA COUNTY, FLORIDA,
Defendants.

COMES NOW the plaintiff, Charlie L. Taite, and for cause of action against the defendants, W. Clyde Busbee, Edwin L. Walker, and C. Brock, as and constituting the Civil Service Board of Escambia County, Florida, Peter Gindle, Chairman and J. E. Hall, Superintendent, of the Board of Public Instruction of Escambia County, Florida, alleges:

1. That plaintiff is a citizen and resident of Escambia County, Florida, and is over the age of twenty-one years.

2. That defendants W. Clyde Busbee, Edwin L. Walker, and C. Brock, are residents of Escambia County, Florida, and constitute the Civil Service Board of Escambia County, Florida; that defendants Peter Gindle and J. E. Hall are residents of Escambia County, Florida, and are chairman and superintendent, respectively, of the Board of Public Instruction of Escambia County, Florida.

3. Plaintiff is now and at all times herein mentioned has been employed as a member of the classified service of Escambia County, Florida under the Civil Service Act of Escambia County, Florida, by the Board of Public Instrùction of Escambia County, Florida, one of the appointing authorities under the jurisdiction of the Civil Service Board of Escambia County, Florida, and subject to the Civil Service Act of Escambia County, Florida, known as Chapter 275.37 - Florida Statutes (1951).

4. On May 31, 1965 one Willie H. Brown was an employee in the classified service of Escambia County, Florida and on said date and for many years prior thereto held the position of custodian supervisor for the Board of Public Instruction of Escambia County, Florida, an appointing authority, as aforesaid, and subject to the Civil Service Act of Escambia County, Florida. On said date and for several years prior thereto plaintiff worked under the supervision of and in the same department as the said Willie H. Brown. On May 31, 1965 the said Willie H. Brown voluntarily retired, creating a vacancy in the department of which plaintiff is a member. According to the Civil Service Act of Escambia County, Florida and the rules and regulations of the Civil Service Board of Escambia County, Florida, a promotional examination should be held to fill the vacancy created by the retirement of the said Willie H. Brown with only members of the Custodial Department of the Board of Public Instruction eligible to take such examination.

5. On or about April 1965 the Board of Public Instruction of Escambia County, Florida, transferred one Clara D. Gordon from his position as stock clerk in the warehousing department and appointed him to the position custodian supervisor, the position previously held by the said Willie H. Brown. That the said Clara D. Gordon has performed the duties of the custodian supervisor since that time although the Civil Service Board has never approved such transfer and/or temporary appointment, and in any case the said board has no authority to approve an appointment to expire more than 120 days from the date of appointment. That because of the illegal appointment plaintiff alleges that the said Clara D. Gordon is not and in good faith cannot be considered a member of the Custodial Department of the Board of Public Instruction of Escambia County, Florida and as such has no right to take an examination, which should be promotional, for filling the vacancy created by the said Willie H. Brown.

Transfer not approved by C.S. Board

more than 20 months

not a member of Custodial Dept.

6. On or about August 9, 1966, the said Board of Public Instruction requested the defendants W. Clyde Busbee, Edwin L. Walker and C. Brock, as and constituting the Civil Service

+

Board of Escambia County, Florida, to re-allocate and downgrade the position of supervisor, custodial services (schools) in pay grade 21 to coordinator of custodial services in grade 20. An excerpt of the board meeting on said date is attached hereto and made part hereof by reference as Exhibit "A." Subsequently the said Civil Service Board denied the request of the Board of Public Instruction to hold a promotional examination exclusively for qualified employees; an excerpt of the minutes of said board wherein said request was denied is attached hereto and made part hereof by reference as Exhibit "B"; that defendant Civil Service Board approved the re-allocation and downgrading of the position of supervisor, custodial services (schools) to coordinator of custodial services but in law and in fact the responsibilities and duties of the purported position of coordinator of custodial services (schools) are the same as those of custodial supervisor; that the request of the Board of Public Instruction for re-allocation and downgrading of the position of supervisor, custodial services (schools) was merely a guise to purportedly clothe the Civil Service Board with authority to order an original entrance examination wherein the said Clara D. Gordon as well as others in any department would be eligible for the examination to fill the vacancy created by the said Willie H. Brown's retirement. Plaintiff alleges that defendants intentionally, willfully and arbitrarily and in violation of the Civil Service Act of Escambia County, Florida sought to abolish the position of custodial supervisor so as to prevent him from obtaining said position but plaintiff alleges that same was not abolished in good faith and in accordance with the Civil Service Act of Escambia County, Florida. A job description of the position held by the said Willie H. Brown as custodial services supervisor (schools) is attached hereto and by reference made part hereof as Exhibit "C"; a job description of the purported position of coordinator of custodial services (schools) is attached hereto and by reference made part hereof as Exhibit "D." Plaintiff alleges that in law and in fact there is no legal distinction or

not abolish in good faith

or differences in the said positions.

7. On many occasions plaintiff requested and demanded that defendants, and each of them, refrain from engaging in the wrongful and unlawful acts as above alleged but said defendants, and each of them, have refused and still refuse to so refrain. During March, 1965 plaintiff requested consideration from J. E. Hall, Superintendent of Public Instruction of Escambia County, Florida, and a copy of a letter to the said J. E. Hall is attached hereto and by reference made part hereof as Exhibit "E"; on August 1, 1966 a copy of Exhibit "E" was sent to defendant Peter Gindle, Chairman of the Board of Public Instruction of Escambia County, Florida; on July 5, 1966 a detailed letter was sent to the defendant Civil Service Board requesting it to refrain from the wrongful or unlawful acts as above alleged, copy of which letter is attached hereto and by reference made part hereof as Exhibit "F". That on numerous occasions plaintiff has appeared before the Civil Service Board and the Board of Public Instruction, all to no avail and he alleges that by reason of the foregoing he has exhausted his administrative remedies and is relegated to his legal remedy in this Court and is without remedy unless this Court's writ of mandamus be issued to require the Civil Service Board to hold a promotional examination for the position of supervisor of custodial services, (schools), denying any but qualified employees to take such examination.

8. That an original entrance examination is scheduled to be held on Tuesday, November 22, 1966, to fill the purported position of coordinator of custodial services (schools); because of defendants schedule and of the entrance examination as hereinabove stated plaintiff will sustain great and irreparable injury in that he will be forced to compete with examination applicants at large rather than those qualified under the Civil Service Act of this County and that it will be practically impossible for plaintiff to ascertain the exact amount of damages which he will sustain through the actions of said defendants if not enjoining therefrom, and further plaintiff cannot be fully compensated in damages and is without any adequate remedy at law.

On Sept 14-1966
J Charles Tate
[illegible] Sent a [illegible] Xerox of Said Position

9. That the actions of defendants W. Clyde Busbee, Edwin L. Walker and C. Brock, as and constituting the Civil Service Board of Escambia County, Florida and J. E. Hall and Peter Gindle, Chairman and Superintendent, respectively, of the Board of Public Instruction of Escambia County, Florida are wrongful, unlawful and contrary to the provisions of the following portions of Chapter 275.37, Florida Statutes (1951);

> "Section 7. With the approval of the Civil Service Board additional classes may be established for new positions created, or positions not included in any previously established class may be allocated thereto, as the administration may require, and existing class or classes may be divided, combined, altered or abolished and positions allocated to any class or classes may be re-allocated.
>
> The appointing authority shall properly report to the Board intention to establish new positions that may be classified and allocated so that certificates may be made or appropriate test provided for and held for the purpose of establishing requisite employment lists for which appointments may be made as provided in this act.
>
> "No position in the classified service shall be abolished without the approval of the Civil Service Board; positions may be abolished only in good faith."
>
> "Section 9. Said Board shall, from time to time, as conditions warrant, hold tests for the purpose of establishing employment lists for the various positions to the classified service. Such tests shall be public, competitive and open to all persons who may lawfully be appointed to any position within the class for such examinations or held with limitations specified in the rules of the Board as to residence, health, habits, moral character, and prerequisite qualifications to perform the duties of such position.
>
> Promotion tests shall be public, competitive and free only to persons examined and appointed under the provisions of this act, and who have held a position for one year or more in a class or rank declared by the Board to involve the performance of duties which tend to fit incumbents for the performance of duty in the class or rank for which the promotion test is held. Provided, however, that when promotion tests are held only employees of the department, office or bureau in which the vacany exists shall be eligible for said promotion tests. In promotion tests efficiency and seniority in service shall form part of such tests."

Check this X

+

Judge ask for Section 9-3

9-2

10. The Board shall hold promotion tests to fill vacancies in each superior class of service whenever there is an inferior rank, the duties of which directly tend to fit the incumbents thereof for the performance of the superior grade or class.

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*** 11. No credit shall be allowed for service rendered under a temporary appointment.

12. Such provisional appointment shall continue only until the establishment of a re-employment or employment list. In no case shall such appointment exceed a total of sixty (60) days.

13. Section 13. Said Board may at any time authorize the transfer of any employee in the classified service from one position to another position in the same class and not otherwise. Transfers shall be permitted only with the consent of the Board and the departments concerned.

And the following particulars:

1. By the school board's actions of transferring an employee from one department and appointing him to a position in another department without the approval of the Civil Service Board.

2. By their actions of allowing an employee to work under a purported temporary appointment for more than 120 days.

3. By attempting to abolish the position of custodial supervisor (schools) and creation of the position of custodial services coordinator which positions, in law and in fact, are one in the same.

4. By their actions in scheduling an original entrance examination rather than a promotional examination to fill the purported position of custodial services coordinator.

5. By allowing persons other than those qualified under Civil Service Laws to take the examination above referred to.

6. The acts of the several defendants as outlined above are pursuant to a plan to keep plaintiff from being appointed custodial supervisor (schools) or the position of custodial services coordinator.

WHEREFORE, plaintiff prays that this Court take jurisdiction of this cause and of the parties hereto and enter decrees as follows:

1. Pending final herein herein decree that defendants, their agents, servants, and employees, be restrained and enjoined from holding an original entrance examination for custodial services supervisor or allowing persons other than those qualified from taking such examination if given.

AND THAT upon final hearing herein, issue its alternative writ of mandamus directed to defendants and each of them respectively, requiring that the position of custodial supervisor (schools) recognize the position of custodial supervisor (schools) as a permanent position under the Civil Service Act of Escambia County, Florida, and that a promotional examination be scheduled to fill any vacancy, such examination being open only to qualified applicants of the custodial department, and decree such other and further relief as justice and equity may require.

NATHANIEL DEDMOND
Attorney for Plaintiff
1707 North Davis Street
Pensacola, Florida

STATE OF FLORIDA

COUNTY OF ESCAMBIA

Before the undersigned authority this day personally appeared Charlie L. Taite who, being first duly sworn, on oath deposes and says that the matters and things set forth in the foregoing complaint are true.

Charlie L. Taite
CHARLIE L. TAITE

Sworn to and subscribed before me this 21st day of November, A. D. 1966.

Notary Public

My Commission Expires
[illegible] COMMISSION EXPIRES SEPT. 6, 1968
[illegible] FRED W. [illegible]

A TRUE COPY OF THE ORIGINAL ON FILE
IN THE CLERK'S OFFICE
WITNESS MY HAND AND OFFICIAL SEAL

ERNIE LEE MAGAHA
CLERK COURT OF RECORD
BY Faye Bauch
DEPUTY CLERK

Exh. "A"

Meeting of Civil Service Board, August 9, 1966.

Vice-Chairman Walker, Dr. Brock, Attorney Lane, and Secretary Butler present. Mr. Walker presided in the absence of the Chairman.

Reading of the minutes of the last meeting were dispensed with and the minutes were approved as distributed prior to the meeting.

Mrs. Rainwater, Dr. Sherman, Mrs. Wiggins, and Captain DeLong, members of the Staff sub-committee of the Advisory Committee appointed by the Juvenile Court Judge to make recommendations concerning the recent survey on juvenile problems and facilities, appeared along with Judge Bruno to request that a Chief Juvenile Counselor Classification and position be established in pay grade 28. Judge Bruno stated in answer to a question asked by Mr. Walker that he was not sure whether the County Commissioners would appropriate sufficient funds to employ a Chief Counselor and a Counselor or whether they would provide for two additional Counselors only. The Board decided, however, after listening to the Committee's presentation to meet with Judge Bruno later in an effort to work out an equitable solution.

Chief Request denied

Request denied from Board of Public Instruction to reallocate a Senior Clerk Typist position to "Abstracting Clerk" in the same pay grade. Denial was based on a recommendation from the Secretary that the position in question is basically of a clerical nature.

Request Heard Aug 9.

Vacancy occurred May 31/65

15 months later

Request approved from the Board of Public Instruction to reallocate and down grade the position of Supervisor, Custodial Services (Schools) in pay grade 21 to Coordinator of Custodial Services in grade 20. Approval was given based on re-organization and changes in duties and responsibilities reported by the Board of Public Instruction.

Examination held Nov. 22; 18 months later. temporary appt is only a 120 day

Check

The Board approved a new classification and position of Planner-Estimator in pay grade 22 as requested by the Board of Public Instruction. The Secretary reported that A. J. Schultheis, School Maintenance Engineer, had been removed from Civil Service by action of the School Board 6-28-66 and recommended that action be withheld pending a conference with schools officials to discuss both positions, as well as to how the Maintenance Superintendent's position would be affected by the change.

Upon advice of Attorney Lane the Board decided to proceed with a hearing for Luther Rollo, Sr., Light Equipment Operator, for whom a termination report was received, effective 7-28-66, but who was still working according to Attorney Paul Shimek in his motion filed, asking for the case to be dismissed- Attorney Lane said Mr. Shimek's motion for dismissal was based on a technicality and agreed to draft a notice of the hearing as requested by the Board.

The Secretary reported she had received no reply from the Board of Public Instruction to a letter written following last meeting requesting a detailed report on the employment and pay status of Robert Godwin, School Bus Operator, also serving

EXh. "B"

The Board denied the request from the Board of Public Instruction to hold a promotional test exclusively for qualified school employees. The examination is to fill the position of Coordinator of Custodial Services for the School Board, which has been a controversial one since the last incumbent, W. H. Brown, retired. The Board directed the Secretary to advertise for an open examination; School Board employees meeting the minimum requirements are to be graded on a promotional basis. An oral examination was requested and approved as a portion of the examination.

Check this

A similar request was made to grade three employees of the Board of Public Instruction on a promotional basis, the three participated in the open examination for Cook, September 2, 1966. Mr. Walker made a motion that it be approved and the Board voted unanimously to do so.

The Board of Public Instruction was refused its request to employ Carolyn Quina, a Diabetic, according to the County Physician. However, in a subsequent action, Mr. Walker conferred with the Physician and it has been determined that a waiver of Civil Service Benefits by Miss Quina would qualify her for Civil Service Employment.

Check this one

One step pay increases were proposed by the Board of County Commissioners for: John Smith, Joe Shelby, James Cobb, Clarence Armstrong and Robert Hagen. Dr. Brock made a motion to deny the action and Mr. Walker seconded the motion.

Request from the Board of County Commissioners to abolish the position of Road Superintendent and Assistant County Purchasing Agent was referred to Attorney Lane to pursue further. A comprehensive report from the Commissioners is to be requested by the Board's Attorney.

Mr. Walker made a motion to approve the request from the Board of County Commissioners to reclassify Curtis Williams, Heavy Equipment Operator, pay grade 14 to Guard, pay grade 15, at the same rate of pay. Mr. Williams previously held the classification of Guard.

Check this one

Check this Pay grade 14 to Guard Pay Grad 15

7.

Grade 28

#417-532

Code: 4150

Housekeeping, Dietary and Custodial Service
Custodial and Housekeeping Group

CLASS TITLE: Custodial Supervisor (Schools)

CHARACTERISTICS OF THE CLASS: Under administrative direction, has charge of and is responsible for the assignment, scheduling and training of all school district custodial personnel; plans and supervises the operations of the district furniture repair shop and the garbage and trash collection services; and does related work as required.

EXAMPLES OF DUTIES:

Periodically checks all schools for cleanliness and safety conditions and makes recommendations to principal for corrective measures; trains custodial personnel in the proper use of equipment, materials and cleaning agents; interviews applicants for employment and makes recommendations on employment, transfer and dismissal; assigns custodial personnel to all new schools and approves substitutions; conducts experiments with various cleaning chemicals to determine those best suited for school use; recommends on and processes requisitions for custodial supplies and equipment; maintains a perpetual inventory of supplies and equipment and assures that all materials remain within the assigned school; prepares and submits periodic reports on custodial operations.

Plans and supervises the operations of the furniture repair shop; selects furniture to be repaired, determines nature of repairs and allocates repaired furniture to needed schools; determines the need for new furniture and requisitions same; plans and supervises the work of the truck crews responsible for the collection of trash and garbage in the school district.

DESIRABLE MINIMUM QUALIFICATIONS: Desirable not mandatory

Training and Experience. Graduation from high school with special training in the selection and proper use of cleaning agents and equipment, supplemented by increasingly responsible custodial experience of which at least three years should have been in the supervision of a custodial crew in a large public or private institution; or an equivalent combination of training and experience.

Knowledge, Abilities, and Skills. Thorough knowledge of proper building cleaning methods; thorough knowledge of chemicals and cleaning materials and equipment used in a school district; good knowledge of school construction.

Ability to organize and direct the work of a large custodial operation; ability to train custodial personnel in the proper use of equipment and cleaning materials; ability to evaluate work performed in accordance with established standards; ability to establish and maintain effective working relationships with subordinates, school personnel and the general public; ability to inspect, review and maintain the necessary records and to prepare accurate and concise reports.

Considerable skill in the application of methods and techniques used in school custodial work, especially as applied to the training and inspection thereof.

NORMAL LINE OF PROMOTION: **FROM:** ~~Buildings and Grounds Foreman;~~ abolished
Senior Building Superintendent

TO: No Normal Line of Promotion

Exh. "C"

Custodial Supervisor
Feb.

12/65 Code: 4190

Housekeeping, Dietary and Custodial Service
Custodial and Housekeeping Group

Coordinator, Custodial
CLASS TITLE: ~~Supervisor, Custodial~~ Services (schools)

CHARACTERISTICS OF THE CLASS: Under general direction, is responsible for administrative details of the maintenance and operations office with particular emphasis on operations (custodial services).

EXAMPLES OF DUTIES:

Periodically checks schools for condition of cleanliness, safety and maintenance; reports condition to the director of maintenance and operations; cooperates with school principals in staffing and custodial work-force in each school making suggestions for more efficient work habits and schedules of operation; may assist in the training or re-training of custodial personnel; may be assigned to conduct experiments or tests in determining products used in floor care or for general cleaning; prepares schedules for special cleaning assignments or other deviations from normal work schedules for custodial personnel; may be assigned special security tasks, checking for and reporting breeches in security; may maintain a personal record file of all custodial personnel.

MINIMUM QUALIFICATIONS:

Training and Experience. Graduation from high school with additional training in the selection and use of cleaning agents and equipment; or in management of personnel supplemented by at least three years experience in the handling of work crews and in records keeping.

Knowledge, Abilities, and Skills. Knowledge of chemicals and cleaning solutions used in building maintenance and custodial services; knowledge of mechanical equipment and building construction.

Ability to plan activities of others and insight to problem solutions; ability to teach others and to evaluate the results of the teaching and effectiveness of personnel assigned to custodial duties; ability to follow instructions and to complete tasks assigned.

Exhibit "D"

2109 N. Haynes Street
Pensacola, Florida
March 1965

Mr. J. E. Hall
Superintendent of Escambia
County Board of Public Instruction
215 W. Garden Street
Pensacola, Florida.

Dear Sir:

I have been given the understanding by Mr. Willie H. Brown, Supervisor of Custodians and Maids of Escambia County Schools, and other persons, that he will resign from his position with the Escambia County School Board at the end of the school term 1964-65.

During the school term Mr. Brown asked me if I would be interested in the position of Supervisor of Custodians and Maids, of Escambia County Schools. I told him that I was very much interested. He said that I am the best qualified person in his department, for the position; and that he would recommend me for the position. However, to date this has not materialized.

Now that Mr. Brown is retiring in May, I am submitting this to you as a formal application for consideration as Supervisor of Custodians and Maids for Escambia County Schools.

Because of my training and experience in this department, I feel that I am qualified for this position. And if I am accepted for this position I will endeavor to execute my responsibilities in a manner acceptable to your office, and the members of the School Board.

Very truly yours,
Charlie L. Taite
Charlie L. Taite

EXHIBIT "E"

2109 N. Haynes St.
Pensacola, Florida
August 1, 1966

Escambia County Board
of Public Instruction
215 W. Garden St.
Pensacola, Florida

Dear Sirs

The attached letter is a duplicate of the letter I sent to Mr. J. E. Hall, Superintendent of Public Instruction, Esc. County, in March 1965. I became aware of the vacancy of the position of Supervisor of Custodians and Maids of Escambia County Schools, which would be created by the forth coming retirement of Mr. W. H. Brown in May 1965.

I received no considera tion , not even a reply to my letter.

Respectfully yours,

Charlie L. Taite

Charlie L. Taite

Exh-"E" Continued

ESCAMBI COUNTY CIVIL SERVICE ASSOCIATION

RECEIVED
JUL 14 1966
ESCAMBIA
CIVIL SERVICE BOARD
PENSACOLA, FLORIDA

July 5, 1966

To The Board of Directors
Pensacola, Florida

Subject: Grievances

Gentlemen:

The retirement of Mr. Willie H. Brown May 31, 1965. from the custodial department., Board of Education Public schools as it's supervisor has posed a problem for many workers, custodians, and maids within the department and especially custodial workers, because of the way they were by passed or over looked in the temporary appointment of someone out side of the department to be it's head. Those of us who so faithfully have worked and put together organizations in cleaning, waxing, and polishing these schools to make them a fit place for class room instruction or what ever the business at hand, feel like it is a great error on the part of the pointing authorities to by pass these people, who have the skill, experience, courage, will power and know how to do a good job. To train men to do a good job and tell them over a period of years, that you're doing a good job then fail to consider them when the opportunity comes for promotion is a slap in the face to every employee in this department or County Civil Service.

The custodial workers department has been moved to the engineer department Mr. Anthony Schulteis put in charge. It is our understanding or recommendation from Mr. Willie H. Brown the retired supervisor that Mr. Clary D. [redacted] be made temporary supervisor over this department. We further understand that he is currently employed in the Warehouse Department as a stock clerk, drawing stock clerk's pay, and to our knowledge the record doesn't show that neither of these men have [illegible] experience in Janitorial, Custodial, or Maids work.

We feel like someone who works in the custodial department can do a better job not only with the work itself, but in keeping harmony, and good will among the workers. If we are not

Exh. "F"

qualified after a long period of years doing this work prey tell me how can a man be qualified with no experience in or outside of this department do a better job.

I know some workers in this department that were told by Mr. Willie Brown a year or more before his retirement that he would personally recommend either one of them for the job and stand by his recommendation. One in particular he went over the details of the work with, and told this individual he would recommend him to the Board of Public Instruction to work in his office along with him several months before he retired as an assistant to him because there should be another man working in the office because the job is to big for one man. It would also give the person a chance to gain some experience on the routine of the office work. The handling of personnel, and the handling of problems that so often come to the office from the various jobs. In other words acting as a trouble shooter and learn the in's and outs of the routine of this office

After a nine months wait and constantly talking about the matter he changes his mind and says he couldn't recommend the individual. His reason was a white man is going to get the job, after a lengthy discussion on the matter he tells this individual he isn't going to recommend any body and if the School Board doesn't make any preparations for the office it will be vacant. He asked this individual not to tell anybody he had talked about it. But several days after that he told a friend of this individual he was going to recommend a man and he reveals the name of the man he is going to recommend, when the charge was made the information revealed to this friend was proven to be true.

We are asking that this condition be corrected, because if it continues an indefinite status after so much time lapse the man in charge now will have gained enough experience to compete in a Civil Service Examination with the advantages of all the information the office can afford, or anything else that might be done.

Yours truly,

C. L. Taite

C. L. Taite

IN THE COURT OF RECORD OF ESCAMBIA COUNTY,
STATE OF FLORIDA. IN CHANCERY.

CHARLIE L. TAITE,
Plaintiff,
vs.
W. CLYDE BUSBEE, EDWIN L. WALKER, and C. BROCK, as and constituting the CIVIL SERVICE BOARD OF ESCAMBIA COUNTY, FLORIDA, and THE BOARD OF PUBLIC INSTRUCTION OF ESCAMBIA COUNTY, FLORIDA, et al,
Defendants.

ANSWER

COME NOW the undersigned attorneys in behalf of Peter Gindel and J. E. Hall, Chairman and Superintendent, respectively, of The Board of Public Instruction of Escambia County, Florida, and The Board of Public Instruction of Escambia County, Florida, and for answer and defenses to the Complaint in the above styled cause say as follows insofar as The Board of Public Instruction of Escambia County, Florida, and the said Chairman and Superintendent are concerned, to wit:

1. That Peter R. Gindel is Chairman of the said Board and J. E. Hall is the Superintendent of Public Instruction of Escambia County, Florida, and as such ex officio Secretary to the said Board and The Board of Public Instruction of Escambia County, Florida, is a body politic of the State of Florida. That the said two individuals as Chairman and Superintendent, respectively, do not constitute the majority of said Board nor are they authorized to control the actions of the said Board or the votes of the members of said Board.

2. That they deny the conclusions of law and of fact contained in the Complaint.

3. That they deny that the Plaintiff is entitled to require of the Civil Service Board of Escambia County, Florida, a promotional examination or to require the same of the other Defendants.

When did these take place - also [illegible]

✓

4. That they deny that the Plaintiff meets the minimum qualifications prescribed for filling the position of Coordinator of Custodial Services (Schools). That they deny that the Plaintiff was or is qualified to take examination to fill the position of Coordinator Custodial Services (Schools) as he does not have the minimum qualifications required to fill said position.

✓ 5. That they allege that there is a marked difference between the characteristics of the class as formerly prescribed for a Custodial Supervisor (Schools) and those prescribed for Coordinator Custodial Services (Schools).✓ That they deny that there was a normal line of promotion for Custodial Supervisor (Schools), if said position still existed and they allege that said position was lawfully abolished.

6. That they deny that there has been collusion between the said Boards as alleged in the Complaint.

7. That they allege that there is a valid legal distinction and difference in the two positions described and characterized in Plaintiff's Exhibits "C" and "D".

✓ 8. That because of action taken by said Civil Service Board at a regular meeting on April 13, 1965, it did issue and distribute a memorandum of directions to all agencies and departments of the county government of Escambia County, Florida, under date of April 16, 1965, and did thereby "freeze" allocation of positions, reallocations and of pay grades and salary increases and the upgrading of positions, pending the outcome of a survey which was then in progress by the said Civil Service Board and a copy of said memorandum marked Exhibit 1 is made part hereof by reference as if set forth herein in full.

✓ That on May 31, 1965, Mr. W. H. Brown, who had been Custodial Supervisor (Schools) under the job description and characteristics described in Plaintiff's Exhibit "C", resigned said position with intention to retire and he had, in addition to overseeing custodial personnel and custodial and janitorial matters, charge of planning and supervising the operation of the when did this take place - was this added

district furniture repair shop and the garbage and trash collection service and other related work. That it was necessary for said Board to continue custodial work and other work and to have the same supervised and because of increased enrollment in the schools of the Board and the increase in numbers of schools and other volume of work, it was necessary that division be made of the same among other employees of said Board on at least a temporary basis, instead of on a permanent basis, because of the matters alleged in connection with the said Defendants' Exhibit 1. That in connection with the continuation of its custodial work, the said Board did appoint on a temporary basis the said Clary D. Gordon to direct the carrying on of the custodial services and to do the work which was later formerly described and being done under Plaintiff's Exhibit "D" and the said Board did move through proper channels to request the said Civil Service Board to properly approve the abolishment of the position described under Plaintiff's Exhibit "C" and to ratify the action of said School Board taken in its regular meeting on September 8, 1965, and confirmed in its regular meeting on October 13, 1965, to abolish the position of Custodial Supervisor (Schools) as described in Plaintiff's Exhibit "C".

not a true statement

9. That on or about December 30, 1965, said Civil Service Board did refer the matter of the proper description of the job position of Coordinator of Custodial Services (Schools) and of the former position of Custodial Supervisor (Schools) (and other matters) to its technical committee for study and recommendation, which study required several months before said technical committee reported to said Civil Service Board/and on or about May 6, 1966, the said Civil Service Board adopted the classification recommendations by said technical committee or ratified the same, which had either been prepared or adopted by the said Civil Service Board or for it during or about the month of December, 1965, Plaintiff's Exhibit "D". On or about June 29, 1966, the said School Board approved and asked the said Civil Service Board to reallocate the position of Supervisor of Custodial Services

(Schools) and the said Civil Service Board thereafter did so, so these Defendants are advised.

10. These Defendants are advised that the said Civil Service Board did permit the Plaintiff to register for an examination to be held on November 22, 1966, to be held on an open competitive basis for the purpose of establishing a new employment list for the aforesaid new position described in Plaintiff's Exhibit "D", but that he failed to take part in said examination and these Defendants allege that he should not have been permitted to register for said examination as heretofore set forth.

11. That these Defendants deny all allegations of wrong doing made against them.

WHEREFORE, these Defendants move that the Complaint of the Plaintiff be dismissed at his costs and expense and that all relief prayed for in his Complaint be denied to him.

C. Edwin Holsberry

C. Edwin Holsberry of
HOLSBERRY, EMMANUEL, SHEPPARD & MITCHELL
Attorneys to The Board of Public
Instruction of Escambia County, Florida,
and in behalf of the Chairman of said
Board and the Superintendent of Public
Instruction of Escambia County, Florida
34 West Government Street
Professional Building
Post Office Box 390
Pensacola, Florida

I certify that a copy hereof was delivered ~~to~~ by delivery to Mr. Nathaniel Dedmond, Attorney for the Plaintiff, ~~by mailing to him at his address of 1707 North Davis Street, Pensacola, Florida~~, and a copy hereof was delivered to Mr. Bert Lane, Attorney for the other Defendant, by delivery, all on the 1st day of December, 1966.

Of Counsel for Aforesaid Defendants

IN THE COURT OF RECORD OF ESCAMBIA COUNTY, FLORIDA,

IN CHANCERY

CHARLIE L. TAITE,

Plaintiff,

vs.

W. CLYDE BUSBEE, EDWIN L. WALKER
and C. BROCK, as and constituting
the CIVIL SERVICE BOARD OF ESCAMBIA
COUNTY, FLORIDA, and THE BOARD OF
PUBLIC INSTRUCTION OF ESCAMBIA
COUNTY, FLORIDA, et al,

Defendants.

- -

ANSWER

The Complaint herein fails to state a cause of action in the following particulars:

(a) It does not appear from the Complaint that Plaintiff has served for one year or more in a class or rank declared by the Board to involve the performance of duties which tend to fit the encumbent for the position of Coordinator of Custodial Services.

(b) It does not appear from the Complaint that the Board has established a normal line of promotion from Custodian to Coordinator of Custodial Services.

(c) It affirmatively appears from Exhibit "C" attached to the Complaint that if the position of Custodial Supervisor (Schools) still existed the normal line of promotion would be from Building and Grounds Foreman or Senior Building Superintendent and not from Custodian, and it affirmatively appears that the Plaintiff is a Custodian. Discrimination

Subject to their foregoing motion to dismiss, W. Clyde Busbee, Edwin L. Walker and C. Brock, as and constituting the Civil Service Board of Escambia County, Florida, answer the Complaint as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. These Defendants deny that the retirement of Willie H. Brown on May 31, 1965, created a vacancy in the Department of which Plaintiff is a member, and they deny that according to the Civil Service Act and the Rules and Regulations of the Civil Service Board a promotional examination is required to be held to fill the vacancy created by the retirement of Willie H. Brown restricted to members of the Custodial Department.

+ Under the classification plan in effect for Escambia County Civil Service employees prior to June 25, 1965, the Civil Service Board had established a normal line of promotion from Building and Grounds Foreman and from Senior Building Superintendent to Custodial Supervisor. Prior to May 31, 1965, the Board of Public Instruction had abolished the position of Building and Grounds Foreman. That X Board had never had the position of Senior Building Superintendent. X Chapter 65-1518, Laws of Florida, Acts of 1965, directed the Escambia County Civil Service Board to prepare and adopt a comprehensive pay and classification plan. More than one year was required to finally consummate the plan. X Normal lines of promotion under this plan have not yet been adopted. These Defendants allege, however, that under the plan heretofore in existence there would not be a normal line of promotion from Custodian to Custodial Supervisor and that there is not now a normal line of promotion from Custodian to Coordinator of Custodial Services.

5. Being aware of pending legislation which would require a complete rework of the Escambia County classification and pay system, the Civil Service Board of Escambia County, Florida, on April 13, 1965, issued and distributed a memorandum of directions to all agencies and departments of Escambia County freezing the allocation of positions, pending adoption of the comprehensive pay and classification plan. Therefore, for the period of more

than one year required for that purpose the Board of Public Instruction was not permitted to fill the position of Custodial Supervisor, and these Defendants are informed and believe that for that interim period the Board of Public Instruction caused the duties previously performed by the Custodial Supervisor to be spread about among employees in other classifications, including Clary D. Gordon, referred to in the Complaint. All other allegations of Paragraph 5 of the Complaint are denied.

6. These Defendants admit that the Board of Public Instruction requested abolition of the job of Custodial Supervisor and creation of the position of Coordinator of Custodial Services and allege that said Board did request the holding of a promotional examination for all persons in all classifications employed by the Board, which request was denied by these Defendants. These Defendants admit that the job descriptions attached to the Complaint as Exhibits "C" and "D" are true and correct. All other allegations of Paragraph 6 of the Complaint are denied.

7. These Defendants admit that the Plaintiff has made requests and demands that the examination in question be limited to Custodians. Plaintiff has made numerous other demands of these Defendants orally and in writing from time to time and has made a veritable nuisance of himself to the extent that at times he has interfered with the orderly procedures at meetings of the Civil Service Board of Escambia County, Florida. These Defendants allege on information and belief that Plaintiff has made unfounded complaints to Civil Rights authorities of both the United States of America and of the State of Florida. By reason of all of the foregoing these Defendants allege that this suit, which is without foundation, is a part of a studied campaign on the part of the Plaintiff to harass and annoy the Escambia County Civil Service Board and the Escambia County Civil Service System and for no other purpose.

All other allegations of Paragraph 7 of the Complaint are denied.

8. An examination was held by the Escambia County Civil Service Board on November 22, 1966, to establish an eligible list for the position of Coordinator of Custodial Services, and the Civil Service Board will shortly be in a position to certify a list of eligibles to the Board of Public Instruction from which it may select an appointee. Plaintiff himself applied to take the test and his application was approved, but, knowing full well that the examination was being conducted, Plaintiff failed and refused to present himself to be examined.

Plaintiff was erroneously approved as an applicant to take said examination because all applicants are required to be high school graduates, and Plaintiff is not a high school graduate.

All other allegations of Paragraph 8 of the Complaint are denied.

9. Denied.

10. Admitted.

11. Admitted.

12. Admitted.

13. Denied.

BERT LANE
Of Beggs, Lane, Daniel, Gaines & Davis
P. O. Box 1351
Pensacola, Florida
Attorneys for W. Clyde Bumbee, Edwin L. Walker and C. Brock, as and constituting the Civil Service Board of Escambia County, Florida.

I hereby certify that copy hereof has been furnished to Mr. Nathaniel Dedmond, Attorney at Law, and copy to Mr. J. Edwin Holsberry, Attorney at Law, both by mail this ____ day of December, 1966.

____
Attorney

IN THE COURT OF RECORD OF

ESCAMBIA COUNTY, FLORIDA

CHARLIE L. TAITE,

Plaintiff,

vs.

W. CLYDE BUSBEE, EDWIN L.
WALKER, and C. BROCK, as and
constituting the CIVIL SERVICE
BOARD OF ESCAMBIA COUNTY,
FLORIDA, PETER GINDLE and J. E. HALL,
Chairman and Superintendent, respectively, of
the BOARD OF PUBLIC INSTRUCTION OF
ESCAMBIA COUNTY, FLORIDA,

Defendants.

* *

The above cause came on for final hearing, evidence was presented, briefs were filed by counsel, and after consideration thereof, the Court makes the following findings. The position of Supervisor, Custodial Services (Schools) was abolished in good faith with approval of the Civil Service Board as required by the Civil Service Act of the County of Escambia, and the position of Coordinator, Custodial Services (Schools) was duly created, An open examination was held to fill the new position, and Plaintiff contends that a promotional examination should have been given. No natural or probable line of promotion to the position of Coordinator, Custodial Services was established by the Civil Service Board, and no class or rank was declared by the Civil Service Board to involve the performance of duties which tend to fit the incumbent for the performance of duties in the rank of Coordinator of Custodial Services, and neither the Appointing Authority nor the Civil Service Board determined that there was an inferior rank, the duties of which directly tend to fit the incumbents thereof for the performance of the duties of Coordinator of Custodial Services. Plaintiff has failed to demonstrate by a preponderance of evidence any abuse of discretion on the part of Defendants in the exercise of their duties, and, further, he has failed to establish that he has the required educational qualifications to take the examination for Coordinator of Custodial Services whether open or promotional, and he is not entitled to a writ of mandamus.

It is, therefore,

ORDERED AND ADJUDGED that Plaintiff's petition for writ of mandamus be and the same is hereby denied, and Plaintiff's complaint be and the same is hereby dismissed.

DONE AND ORDERED at Pensacola, Escambia County, Florida, this 16th day of March, 1967.

(SIGNED) M. C. BLANCHARD

JUDGE

A TRUE COPY OF THE ORIGINAL ON FILE
IN THE CLERK'S OFFICE
WITNESS MY HAND AND OFFICIAL SEAL

ERNIE LEE MAGAHA
CLERK COURT OF RECORD
BY Faye Baisch
DEPUTY CLERK

Please return

1 Abuse: To put to a wrong or Bad use; as, to abuse one's powers,
2, To mistreat; as, to abuse slaves, 3. To revile; to reproach Coarsely; disparage,
1. misuse; as, an abuse of his privileges, 2, Physical ill treatment,
3 A. Corrupt practice or Custom; fault; offense, 4. Coarse and insulting
Speech.

Discretion, power of free decision; individual judgment;
Undirected Choice; as, left to the president's discretion. prudence;
discreetness; hence. Caution reserve in speech

Orig File

EGGART & HOFFMAN
ATTORNEYS AT LAW
PENSACOLA, FLORIDA 32501

R. BROWNLEE EGGART
WILLIAM HOFFMAN
JAMES R. SHELLEY

333 SOUTH BAYLEN STREET
TELEPHONE 432-3402

February 27, 1967

Honorable M. C. Blanchard
Judge, Court of Record
Escambia County
Court of Record Building
Pensacola, Florida

Re: Charlie L. Taite -vs-
W. Clyde Busbee, et als.

Dear Judge Blanchard:

Pursuant to your request of February 17, 1967, at final hearing in the styled cause, this letter speaks to the following issue: "Does the import of the phrase "inferior rank" as used in Section 9(3) include ranks below the next inferior rank below that of the class for which the plaintiff seeks a promotional examination." As applied to the present case, "would a promotional examination for the position of Custodial Supervisor (schools), Civil Service Code Classification 4150, or as reconstituted, the position of custodial supervisor, Civil Service Code classification 4190 be open to the classification of Senior Custodian, Civil Service Code 4135, or would such a promotional examination be limited to the next inferior rank, to wit: Custodial Foreman, Civil Service Code classification 4138."

Section 9(3) places only two (2) limitations upon the class entitled to a promotional examination, to wit: (1) It must be an "inferior rank", and (2) "The duties" of the inferior rank must "tend to fit incumbents . . . for the performance of the superior grade or class." Whenever such an inferior rank exists, the Board "shall hold" a promotional examination. The uncontroverted evidence aduced at final hearing sustained the plaintiff's position that (1) his rank is inferior to the position for which he seeks a promotional examination; (2) that the duties of his classification "directly tend to fit" him "for the performance of the superior grade or class", and (3) the Board has reused the mandate of Section 9(3) to hold a promotional examination.

The defendants maintain that Section 9(3) is to be construed by the Court to include other limitations upon that provisions absolute direction to hold a promotional examination when "vacancies" in a "superior class" occurs.

We are directed by the defense to the second paragraph of Section 6 and Section 9(2):

what about this case +

> As far as practicable, the natural or probable lines to and from the class of position shall be designated or indicated.
>
> Promotion tests shall be public, competitive and free only to all persons examined and appointed under the provisions of this act, and who have held a position for one (1) year or more in a class or rank declared by the Board to involve the performance of duties which tend to fit the incumbent for the performance of duty in the class or rank for which the promotion test is held. Provided, however, that when promotion tests are held only employees of the department, office or bureau in which the vacancy exists shall be eligible for said promotion test. In promotion tests efficiency and seniority shall form part of such tests.

Plaintiff's counsel is aware of no other extant limitation upon Section 9(3)'s absolute direction to the Board to hold a promotional examination.

The defendants' position is that the Board has not, as authorized and directed by the second paragraph of Section 6, "designated or indicated" the "natural or probable lines from the inferior class of senior janitor to the superior class". Further, that unless and until the Civil Service Board has "declared" Section 9(2) that the duties of Senior Custodian tend to fit a Senior Custodian for the superior class, there can exist no "natural or probable line(s) from Senior Custodian to the superior class." In effect, the defense interposes an additional limitation upon Section 9(3)'s absolute direction to the Board to hold a promotional examination, to wit: The Board must have "designated or indicated" (Section 6, 2d par.) and "declared" Section 9(2) that the duties of Senior Custodian tend to fit a Senior Custodian for the performance of duty in the superior class.

In rebuttal, the plaintiff's position, sustained by the testimony of Mrs. Butler, is that (1) the only way such designations, indications, or declarations are made by the Civil Service Board is by the Code Classifications setting forth the (a) class title, (b) examples of duties, (c) requirements, (d) qualifications and (e) the normal lines of promotion. (The pertenent code classifications are attached hereto); (2) that the designated, indicated and declared "normal lines of promotion by such code classifications is from Senior Janitor to Custodial Foreman to Buildings and Grounds Foreman to the Superior class; or, from Senior Janitor to Custodial Foreman to Building Supervisor to Senior Building Supervisor to the superior class.

The defense offers no provision of the law, rule or regulation which restricts promotional examinations as required by Section 9(3), to the next inferior level. Such a restriction would make superferlious and meaningless the other restriction that the duties of the inferior rank tend to fit the incumbent for the superior rank. It is submitted that the latter restriction is the definition of "normal line(s) of promotion" and if the duties of any inferior rank tends to fit the incumbent for the superior class, and the inferior and superior ranks are in a designated, indicated or declared line of promotion, as here shown by attached code classifications, then the Board shall hold a promotional examination and permit the inferior rank participation.

Given the opportunity for a fair and impartial promotional examination, the plaintiff will demonstrate that the duties of Senior Custodian have made him fit for the performance of duty in the superior class in fact as well as in law.

Respectfully submitted,

William Hoffman,
For the Firm
Eggart and Hoffman
333 South Baylen Street
Pensacola, Florida

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ATTORNEYS AND COUNSELLORS AT LAW
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[illegible]
POST OFFICE BOX 1351
TELEPHONE 432-2451

March 1, 1967

Hon. M. C. Blanchard
Judge of Court of Record
Pensacola, Florida

Dear Judge Blanchard:

Re: Charlie L. Taite v. School Board
and Civil Service Board

The Court will recall that at the commencement of the hearing in this matter, in view of the fact that the maximum number of five applicants who successfully passed the Civil Service examination for the position of Coordinator of Custodial Services have already been certified to the Board of Public Instruction, the Civil Service Board asserted that each of these parties should be joined as respondents to this proceeding. The Florida cases on this subject are summarized in 21 Fla. Jur., Mandamus, § 100, Page 413, where it is stated "it is necessary to make all persons whose rights may be adversely affected parties respondent in a mandamus action if such rights are real and substantial".

It was conceded at the trial of this case that graduation from high school is a minimum qualification for one seeking employment as, or promotion to, Coordinator of Custodial Services. It was further conceded that petitioner

the beginning of this trial, was to show cause,
why the coordination examination should not be held

herein is not a high school graduate.

If a promotional examination had been called in exactly the same manner contended for by petitioner and with exactly the same limitations contended for by petitioner, he would not have been entitled to take the examination nor would he have been able to compel by mandamus his admission to the promotional examination held as he contends. In all probability mandamus would have been available to any interested party to prevent the petitioner from taking that very examination.

The editors in 21 Fla. Jur., Mandamus, § 31, Page 336, summarize the Florida law on the subject as follows:

> "The duties that fall within the scope of mandamus are legal duties of a specific, imperative, and ministerial character, as distinguished from those that are permissive or discretionary. Discretion, as thus intended, means the power or right, conferred upon the officer by law, of acting officially under certain circumstances according to the dictates of his own judgment and conscience, without the control of the judgment or conscience of others. But a public officer is in duty bound to exercise the judgment or discretion reposed in him by law. If he fails or refuses to do so, and does not act upon the subject or pass upon the question on which such judgment or discretion is to be exercised, then the writ of mandamus may be used to enforce obedience to the law. In other words, when, in matters involving discretion, the respondent refuses to act at all, mandamus may issue to move him to action and to exercise his discretion in the matter. The relator in such cases merely asks that the respondent make a decision in one way or the other. He does not seek to use the writ to compel or control a decision in any particular way. As generally stated, writs of mandamus

> will not issue to control the exercise of official discretion or judgment or to alter or review action taken in the proper exercise of such discretion or judgment, for the writ cannot be issued as a writ of error or other mode of direct review. Insofar as an officer's decision is purely judicial and it appears that he has kept within his jurisdiction, notwithstanding it may appear to another that his judgment was not sound and that his decision was erroneous, no writ of mandamus will lie to oblige him to adopt any other mode of decision than that which his own judgment sanctions. Were the rule otherwise, the discretion of a court would be substituted for that of officers in the discharge of their duty."

It is elementary that courts will not entertain jurisdiction to decide hypothetical, abstract or moot questions. There is no doubt but that the Escambia County Civil Service Board acted without lawful authority when it opened the examination to Charlie Taite. He refused to participate in the examination as to which he had no lawful right and now seeks to exclude from some hypothetical future examination on a promotional basis other persons not employed by the School Board. It would certainly seem reasonable and logical that one who never had any legal right would be able to come into Court and contend that a privilege extended him without authority of law now gives him the "absolute clear legal right to the remedy of mandamus". See State ex rel. Eldredge v. Evans (1958, Fla. App.), 102 So. 2d 403.

Assuming for the purpose of argument that no other parties are entitled to be heard herein and assuming that petitioner is a high school graduate, it is clear from the evidence that the Civil Service Board has lawfully discharged its statutory duties. The applicable statutory provisions are as follows:

1) Section 6 provides that as far as practicable, + the natural or probable lines of promotion to and from the class of position shall be designated or indicated. In the first place, this language indicates that lines of promotion will not be designated in every instance. In the light of the statutory provisions referred to hereinafter, it would seem + that a promotional examination would not be in order when lines of promotion have not been established. On the other hand, it would seem reasonable that when the lines of promotion have been established, then the line designated should be followed. We will point out hereinafter the difference between the job of Custodial Supervisor and the job of Coordinator of Custodial Services. However, petitioner has contended that the two jobs are the same, and, if this be assumed to be true, then the line of promotion should be the same.

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[illegible]

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no-

2) Section 7 provides that whenever a new classified position is established or "the duties of existing positions are so changed that, in effect, the old position no longer exists" the Board shall reclassify the position to its appropriate class in accordance with the classification +

plan. Here again, except in the abuse of administrative discretion, the matter of reclassifying is with the Board. It would naturally follow that lines of promotion continuing, created or disestablished in setting up a new position or reclassifying an old position would be with the Civil Service Board.

3) Section 9(2) specifies that promotion tests shall be open only to persons previously appointed under the Civil Service Act and who have held a position for one year or more "in a class or rank declared by the Board to involve the performance of duties which tend to fit the encumbent for the performance of duty in the class or rank for which the promotion test is held". By declaring the examination open the Board thereby at least impliedly declared that there were not those persons in a class or rank which tended to fit him or her for the job of Coordinator of Custodial Services.

4) Section 9(3) restates the same proposition another way by stating that the Board shall hold promotion tests to fill vacancies in each superior class of service whenever there is an inferior rank, the duties of which directly tend to fit the encumbents thereof for the performance of the superior grade or class. However, the language of this section of the statute seems to support our interpretation of Section 6: When position "A" becomes vacant, and there is only one person in rank "B", then three

not

persons in rank "C" do not have the privileges of a promotional examination, but this examination is available only to "B" because he is in the line of promotion. We submit that this is in accordance with usage and practice in industry, in government, in the military and wherever advancements are made by promotion.

Lastly, we submit that Coordinator of Custodial Services is an entirely new classification, and any previous lines of promotion would not attach.

The old Custodial Supervisor had charge of and was responsible for the assignments, scheduling and training of all school custodial personnel. The Coordinator does not have this personnel authority or responsibility. The old Supervisor had charge of the furniture repair shop and garbage and trash collection services. + The Coordinator has neither the responsibility nor the authority for these operations. The Coordinator works with the school principals for the coordination of custodial services, prepares work schedules, maintains personnel records and files and assumes certain tasks in connection with security. The Supervisor did none of these things. The Coordinator is a progress man, a planner and high-type clerical technician. The Custodial Supervisor was a foreman or a boss. These job bossing responsibilities and authorities have been assigned to others. The work of the Coordinator is different

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from anything which has been heretofore carried on by the Board of Public Instruction in connection with its custodial services.

We submit that the petition for writ of mandamus should be quashed.

Respectfully yours,

For the Firm

BHL/jb

cc: James R. Shelley, Esq.
Attorney at Law
333 South Baylen Street
Pensacola, Florida

J. Edwin Holsberry, Esq.
Attorney at Law
34 West Government Street
Pensacola, Florida

EGGART & HOFFMAN
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PENSACOLA, FLORIDA 32501

R. BROWNLEE EGGART
WILLIAM HOFFMAN

JAMES R. SHELLEY

333 SOUTH BAYLEN STREET
TELEPHONE 432-3492

March 7, 1967

Mr. Charlie L. Taite
2109 North Hayne Street
Pensacola, Florida

Dear Mr. Taite:

As of this time we have not heard from Mr. Holsberry, and presume that he will not file a brief.

Yours very truly,

James R. Shelley

JAMES R. SHELLEY,
For the Firm

JRS/cas

P. S. Also, we are enclosing copies of the brief that we prepared and the one that Bert Lane prepared.

nd Fla Gen

EGGART & HOFFMAN
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333 SOUTH BAYLEN STREET
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904

August 17, 1967

Mr. Carl Rachlin
150 Nassau Street
New York, New York

Dear Mr. Rachlin:

RE: CHARLIE TAITE vs. CYLDE BUSBEE

You are advised that the file requested by Mr. John D. Due, Jr.'s letter of August 15, 1967, is urgently needed to perfect Mr. Taite's appeal.

Please call me collect to acknowledge this inquiry and your compliance with this request.

Very truly yours,

James R. Shelley

JAMES R. SHELLEY
For the Firm

JRS/jfs

cc Mr. John D. Due, Jr.
Charlie L. Taite
Mr. Ernie Lee Magaha, Clerk of Court of Record

Code: 4135

Housekeeping, Dietary and Custodial Service
Custodial and Housekeeping Group

CLASS TITLE: Senior Custodian

CHARACTERISTICS OF THE CLASS: Under general supervision, assigns and supervises a janitorial crew in the cleaning of county or school buildings; makes semi-skilled repairs and adjustements on buildings and equipment; and does related work as required.

EXAMPLES OF DUTIES:

Locks and unlocks buildings; assigns and supervises a small crew of janitors and janitresses whose duties involve such as sweeping, mopping, scrubbing, and polishing floors, as well as the washing of walls, windows and woodwork; personally performs the more difficult janitorial tasks; checks that subordinates properly dust, polish, and arrange furniture and equipment; inspects rest rooms for cleanliness and for adequate supplies; operates a low pressure heating plant and makes minor adjustments thereof; performs semi-skilled tasks in connection with the general maintenance of equipment buildings and other such facilities; assists maintenance crews in major repair work; maintains and requisitions new cleaning materials, light bulbs and related supplies; keeps simple records and makes routine reports.

DESIRABLE MINIMUM QUALIFICATIONS:

Training and Experience. Completion of the eighth grade supplemented by at least three years of experience in cleaning and maintaining large office buildings; or an equivalent combination of training and experience.

Knowledge, Abilities, and Skills. Considerable knowledge of methods, tools, materials and practices used in janitorial work; good knowledge of the care of mops, brooms, scrubbing brushes, dusters and vacuum cleaners.

Ability to assign, supervise and inspect the work of subordinates; ability to understand and follow simple oral and written instructions; ability to perform a wide variety of semi-skilled repairs and adjustments on building equipment and facilities.

Skill in the application of methods and practices used in general janitorial work and in the care of pertinent tools, equipment and facilities; some skill in the repair and adjustments of buildings and equipment.

NORMAL LINE OF PROMOTION: FROM; Custodian; Senior Janitor

TO: Custodial Foreman
Building Superintendent

Code: 4138

Housekeeping, Dietary and Custodial Service
Custodial and Housekeeping Group

CLASS TITLE: Custodial Foreman

CHARACTERISTICS OF THE CLASS: Under direction, has charge of and is responsible for the custodial services of a large institutional plant; and does related work as required.

EXAMPLES OF DUTIES:

Assigns and supervises the work of the janitoral crews and assists in the cleaning and waxing of the institutional facilities; inspects offices, meeting rooms, class rooms, hallways and restrooms for cleanliness and proper maintenance; supervises the care of adjacent grounds; instructs employees in the proper use of janitorial supplies and equipment; requisitions and distributes janitorial supplies and prepares proper reports on employee work hours and materials used.

Personally opens and secures buildings and gates or assigns task to a responsible employee; performs the more difficult custodial operations; does a substantial amount of first-line maintenance on building equipment such as unstopping commodes and wash basins, replacing wall switches and performing limited repairs and adjustments to the boilers and heating system; assists maintenance crews in major repair work.

DESIRABLE MINIMUM QUALIFICATIONS:

Training and Experience. Completion of the eighth grade with formal training in janitorial work, supplemented by five years of increasingly responsible custodial experience of which at least two years was in a supervisory capacity; or an equivalent combination of training and experience.

Knowledge, Abilities, and Skills. Considerable knowledge of cleaning methods, materials and equipment; considerable knowledge of the maintenance procedures essential to the upkeep of buildings; considerable knowledge of the minor and routine maintenance and repair of plumbing, painting, carpentry, electrical and heating and air conditioning systems; good knowledge of the care and maintenance of grounds.

Ability to observe, interpret and manipulate valves and other controls on heating and cooling equipment; ability to perform minor maintenance and adjustments to equipment; ability to plan work assignments and supervise and direct the work of custodial personnel; ability to train new employees in proper cleaning procedures; ability to deal tactfully with faculty, students and subordinates; ability to keep simple records and to make reports.

Considerable skill in the application of methods and techniques used in janitorial work, especially as applied to the supervision thereof, and in the care and use of pertinent tools, equipment, supplies and facilities.

NORMAL LINE OF PROMOTION: FROM: Janitor Foreman; Senior Custodian

TO: Buildings and Grounds Foreman

Code: 4148

Housekeeping, Dietary and Custodial Service
Custodial and Housekeeping Group

CLASS TITLE: Buildings and Grounds Foreman

CHARACTERISTICS OF THE CLASS: Under direction, has charge of and is responsible for the general maintenance of the buildings and grounds of a large institutional plant; and does related work as required.

EXAMPLES OF DUTIES:

Prepares daily assignment sheets outlining work stations and specific tasks to be performed by the janitorial and grounds maintenance crews and individual workers; periodically inspects office rooms, class rooms, halls, lavatories, and other areas to determine that cleanliness and orderliness standards are being maintained; observes quality of work and advises the employees of conditions that do not meet the standards; inspects and personally operates the institution's heating and air conditioning units; observes meters and gauges; maintains records of local temperatures; records such data as hours of operation, temperature, pressure, etc.

Supervises the landscaping and general maintenance of grounds, such as cultivating and caring for lawns, shrubbery and flower beds, planting trees, shrubs and flowers; requisitions, stores and issues supplies and materials; inventories materials and investigates unduly heavy consumption of supplies to detect waste; personally performs the more difficult tasks in connection with custodial maintenance and grounds keeping work; notifies proper authorities on major repairs needed for buildings, equipment and grounds.

DESIRABLE MINIMUM QUALIFICATIONS:

Training and Experience. Graduation from high school with special training in the use of custodial materials and equipment, supplemented by seven years of increasingly responsible custodial work including at least two years in the supervision of a large custodial and grounds crew; or an equivalent combination of training and experience.

Knowledge, Abilities, and Skills. Considerable knowledge of cleaning methods, materials and equipment; considerable knowledge of the care and maintenance of grounds; good knowledge of the materials essential for the repair and maintenance of buildings and grounds; considerable knowledge of the maintenance procedures essential to the upkeep of a large institutional plant.

Ability to interpret plans and sketches and to follow complex instructions; ability to plan and supervise the work of a large custodial and grounds crew; ability to deal tactfully with faculty, students, administrative staff and other employees.

Considerable skill in the application of methods and techniques used in janitorial and grounds maintenance work; especially as applied to the supervision thereof, and in the care and use of pertinent tools, equipment, supplies and facilities.

NORMAL LINE OF PROMOTION:

FROM: Custodial Foreman;
Building Superintendent

TO: School Custodial Supervisor

Code: 4140

Housekeeping, Dietary and Custodial Service
Custodial and Housekeeping Group

CLASS TITLE: Building Superintendent

CHARACTERISTICS OF THE CLASS: Under direction, has responsibility for all custodial work of an assigned building as well as minor maintenance care of the building, grounds and simple equipment; has responsibility for the operation of heating and cooling systems; and does related work as required.

EXAMPLES OF DUTIES:

Assigns, supervises, inspects and assists with the cleaning of the building and equipment; instructs subordinates in proper cleaning methods and use and care of cleaning equipment, such as polishers, waxers and brush mops; may make minor repairs on buildings and equipment and report need for major repairs; requisitions supplies and issues same to subordinate workers.

Inspects work to determine that instructions are being carried out; keeps simple records and submits reports of work performed to superior; operates low pressure boilers and manually controlled air conditioning equipment, performing such duties as starting and stopping equipment, observing meters and gauges, and manipulating valves and other controls to regulate machinery; maintains record of temperatures; maintains operating log, recording such data as hours of operation, temperature, pressure, etc.

DESIRABLE MINIMUM QUALIFICATIONS:

Training and Experience. Completion of the eighth grade supplemented by at least four years of progressively responsible experience in general custodial work, one year of which should have been on a supervisory level and directly concerning such as the operation of heating and cooling systems; or an equivalent combination of training and experience.

Knowledge, Abilities, and Skills. Thorough knowledge of cleaning methods, materials and equipment; some knowledge of skills involved in routine building maintenance.

Ability to write and make arithmetical computations and to follow complex instructions; ability to observe meters and gauges in interpretation of heating and cooling systems, and ability to manipulate valves and other controls to regulate functioning of equipment; ability to give attention to detail for extended periods of time with realization that errors may result in damage to expensive equipment and safety for building occupants; ability to work with other employees, officials and the public; ability to keep routine records and make reports.

Considerable skill in the application of methods and techniques used in janitorial work, especially as applied to the supervision thereof, and in the care and use of pertinent tools, equipment, supplies and facilities.

NORMAL LINES OF PROMOTION: FROM: Assistant Building Superintendent

TO: Senior Building Superintendent

Code: 4144

Housekeeping, Dietary and Custodial Service
Custodial and Housekeeping Group

CLASS TITLE: Senior Building Superintendent

CHARACTERISTICS OF THE CLASS: Under general direction, has responsibility for custodial and major maintenance care of assigned buildings, grounds and equipment, as well as operating complex heating and cooling systems; and does related work as required.

EXAMPLES OF DUTIES:

Plans custodial work schedules for buildings, assigns work to subordinates and makes frequent inspection of building to determine that janitorial and other work is being properly performed; develops standard custodial work methods and instructs subordinates in proper methods and processes; inspects building, premises and equipment to determine the existence of conditions calling for electrical, carpentry, plumbing or mechanical repairs and personally performs skilled trades work in the repair of same; maintains adequate safety protection for building occupants and public by directing elimination of fire or other hazards; provides special services such as labor for intra-office furniture arrangement or individual office problems in regard to additional lighting, heating and ventilation; supervises and participates in the operation of boilers and manually controlled air conditioning equipment, performing such duties as starting and stopping equipment, observing meters and gauges, manipulating valves and other controls to regulate machinery; maintains record of local temperatures; maintains operating log, recording such data as hours of operation, temperature and pressure; prepares estimated fiscal budget for cleaning supplies and equipment, and submits to administrative superior for approval; keeps records and makes reports.

DESIRABLE MINIMUM QUALIFICATIONS:

Training and Experience. Graduation from high school supplemented by at least two years of post journeyman level experience in general building maintenance; or an equivalent combination of training and experience.

Knowledge, Abilities, and Skills. Thorough knowledge of cleaning methods, materials and equipment; journeyman level knowledge of general building maintenance.

Ability to plan, assign and coordinate the work of a number of workers engaged in diversified custodial duties; ability to give attention to details for extended periods of time with realization that errors may result in damage to expensive equipment, and safety for building occupants; ability to read, write, make arithmetical computations and to follow complex instructions; ability to interpret semi-technical blueprints and specifications; ability to maintain effective relationships with officials, county personnel, subordinate workers and the public; ability to interpret the operation of equipment by meters and gauges and ability to manipulate valves and other controls to regulate functioning of equipment; ability to maintain necessary records and to prepare reports of work performed.

Journeyman level of skill and general building maintenance work and in the care and use of pertinent tools, equipment and facilities.

NORMAL LINES OF PROMOTION: FROM: Building Superintendent
TO: Senior Building Superintendent

Code: 4150

Housekeeping, Dietary and Custodial Service
Custodial and Housekeeping Group

CLASS TITLE: Custodial Supervisor (Schools)

CHARACTERISTICS OF THE CLASS: Under administrative direction, has charge of and is responsible for the assignment, scheduling and training of all school district custodial personnel; plans and supervises the operations of the district furniture repair shop and the garbage and trash collection services; and does related work as required.

EXAMPLES OF DUTIES:

Periodically checks all schools for cleanliness and safety conditions and makes recommendations to principal for corrective measures; trains custodial personnel in the proper use of equipment, materials and cleaning agents; interviews applicants for employment and makes recommendations on employment, transfer and dismissal; assigns custodial personnel to all new schools and approves substitutions; conducts experiments with various cleaning chemicals to determine those best suited for school use; recommends on and processes requisitions for custodial supplies and equipment; maintains a perpetual inventory of supplies and equipment and assures that all materials remain within the assigned school; prepares and submits periodic reports on custodial operations.

Plans and supervises the operations of the furniture repair shop; selects furniture to be repaired, determines nature of repairs and allocates repaired furniture to needed schools; determines the need for new furniture and requisitions same; plans and supervises the work of the truck crews responsible for the collection of trash and garbage in the school district.

DESIRABLE MINIMUM QUALIFICATIONS:

Training and Experience. Graduation from high school with special training in the selection and proper use of cleaning agents and equipment, supplemented by increasingly responsible custodial experience of which at least three years should have been in the supervision of a custodial crew in a large public or private institution; or an equivalent combination of training and experience.

Knowledge, Abilities, and Skills. Thorough knowledge of proper building cleaning methods; thorough knowledge of chemicals and cleaning materials and equipment used in a school district; good knowledge of school construction.

Ability to organize and direct the work of a large custodial operation; ability to train custodial personnel in the proper use of equipment and cleaning materials; ability to evaluate work performed in accordance with established standards; ability to establish and maintain effective working relationships with subordinates, school personnel and the general public; ability to inspect, review and maintain the necessary records and to prepare accurate and concise reports.

Considerable skill in the application of methods and techniques used in school custodial work, especially as applied to the training and inspection thereof.

NORMAL LINE OF PROMOTION: FROM: Buildings and Grounds Foreman;
Senior Building Superintendent

TO: No Normal Line of Promotion

SEDFRE

CITY OF TALLAHASSEE vs. GORDON, SPIVER W., 1965-1966

Society of Wisconsin

Please Retain Original Order

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE

vs. No. 1732

SPIVER GORDON

PETITION TO REMAND

Comes now the City of Tallahassee and moves the Court to remand this cause to the Municipal Court of the City of Tallahassee, from which Court it was attempted to be removed to this Court, for the reasons and upon the grounds hereinafter set forth:

1. The Petition for Removal is not verified in accordance with the requirements of law.

2. The Petition for Removal fails to state facts constituting grounds for removal.

3. The Petition for Removal is legally insufficient to support removal of this cause.

WHEREFORE the City of Tallahassee prays that this cause may be remanded to the Municipal Court of the City of Tallahassee to be there proceeded with according to the practice governing such cases.

Roy T. Rhodes

Roy T. Rhodes
102½ South Monroe
Tallahassee, Florida

City Attorney

Edw J Hill

Edw. J. Hill
P. O. Box 1324
Tallahassee, Florida

City Solicitor

Rivers Buford Jr.

Rivers Buford, Jr.
204 N. Gadsden Street
Tallahassee, Florida

Assistant City Attorney

I HEREBY CERTIFY that a copy of foregoing was served, by mail, upon JOHN D. DUE, JR., Esquire, 540½ W. Brevard Street, Tallahassee, Florida, attorney for SPIVER GORDON, this 19th day of November, 1965.

Rivers Buford Jr

Attorney

[1965, December 22]

IN THE
UNITED STATES COURT OF APPEALS
For the Fifth Circuit
Tal. Crim. No. 2732

SPIVER W. GORDON

-v.-

CITY OF TALLAHASSEE

MOTION FOR A STAY PENDING APPEAL

1. On October 8, 1965, a petition was filed in the United States District Court for the Northern District of Florida, seeking to remove a city offense prosecution, pending in the Municipal Court of the City of Tallahassee, Florida, against Spiver W. Gordon arising from his arrest on September 27, 1965 on the charge of "solicit (sic.) for lewd and lascivious act, to-wit, fellation." The jurisdiction of the District Court was invoked under 28 U.S.C. §1443 (1) and (2) (1958).
2. A copy of the removal petition is annexed hereto as Appendix "A" and allegations of the petition are hereby incorporated by reference.
3. On November 19th, 1965 a petition to remand was filed in this Court by the Attorney for the City of Tallahassee. A copy of said petition to remand is annexed hereto as Appendix "B". The petition to remand did not contest the factual allegation of the removal petition but merely questioned the legal sufficiency of the petition.
4. Argument on the motion for remand was set for December 22nd, 1965, and counsel for petitioner submitted a memorandum of law in opposition to the motion to remand annexed hereto as Appendix "C". This District Court, Hon. G. Harrold Carswell, Judge, presiding, called, [illegible] petitioner, for evidence on the

truth of the allegations set forth in the removal petition, but did not bear arguments on the legal sufficiency of the petition. The Court refused to grant a continuance to allow petitioner to present evidence in support of the allegations in his petition for removal.

5. On December 23rd, 1965, the Hon. G. Harrold Carswell ordered the case remanded to the Municipal Court for the City of Tallahassee. Acopy of the order is appended as Appendix "D". Notice of appeal was filed in the District Court on December 29, 1965. A copy of said Notice is annexed hereto as Appendix "E". A Motion For Relief in the Nature of Mandamus is filed in this court herewith.

6. A "Motion for Recall of Order to Remand and For a Stay Pending Appeal" was filed in the District Court on January 17th, 1965, and a hearing was held before the Hon. G. Harrold Carswell, Judge, on the same day. The Court denied the motion on January 17, 1966. A copy of the motion with annexed appendices "A" to "K" is attached hereto as Appendix "F". The order denying the motion is appended hereto as Exhibit "G".

7. As stated previously in point (3), the motion to remand raised no issues of fact and hence, an evidentiary hearing was uncalled for. Even had such a hearing been justified, counsel for petitioner had no notice thereof. Rather, he was led to expect only an argument on the question of whether or not the petition for removal stated adequate grounds for removal as a matter of law. Considering the nature of the motion to remand and the issues raised thereby, the factual allegations of the removal petition should have been taken as true.

8. Hand the motion to remand controverted the factual allegation of the removal petition thus creating an issue for evidentiary hearing, and had the petitioner been

duly notified that such a hearing was to be held, and had he been granted edequate opportunity to present evidence, supporting the allegations of the removal petition, the petitioner would have presented inter alia evidence as appears in the affidavits appended to the Motion for Recall... (etc.) annexed as Appendix "F":

(a) That due to the hostility of the Municipal Court to people active in the civil rights movement, petitioner would have been unable to raise objections to denials of his federal rights.

(b) That the prosecution of the petitioner was part of a continuous pattern of official hostility designed to harrass and intimidate people active in the civil rights movement from purduing equal protection of the laws.

(c) That the charges against the petitioner was an unconstitutional application of the statute.

all of which are alleged in the petition for removal and any of which constitute adequate grounds for removal as a matter of law, since they show a "... planned prosecutional abuse of a (state criminal) statute." Dombrowski v. Pfister, 380 U.S. 479, 85S.Ct. 1116, 14 L.Ed.2d 22 (1965); Cox v. State of Louisiana, 348 F2d 750 (5th Cir., 1965).

9. Thus unless the order of remand is stayed forthwith, petitioner will suffer an irreparable injury. The pending criminal charge is now set for trial in the Municipal Court of the City of Tallahassee on January 20, 1966. Prosecution in the Municipal Court serves no legitimate State or City concern if the removal is proper. It does - (a) take petitioner to trial, in a forum in which Congress has directed that he not be tried, and in which he cannot effectively enforce his federal constitutional and statutory rights, (b) subject him [illegible]

straints of the state criminal process during the very period, when his right to federal removal is being tested. (c) potentially moot the question of the propriety of the removal, and, (d) thus punish him for excercising, and inhibit the excercise in the future, of his 1st and 14th Ammendment freedoms, and those of his associates.

10. Stays pending appeal of remand orders in similar cases have recently been issued in Baines v. Danville, 321 Fed. 2nd 643 (4th Cir., 1963); Rachael v. Georgia, 342 F2d. 336 (5th Cir., 1965); Georgia v. Tuttle, 32 U.S.L. Week 3446 (decided June 22, 1964); and in Cox v. Louisiana, 348 F2d. 750 (5h Cir., 1965); the Supreme Court sustaining the Court of Appeals in the Fifth Circuit in the Rachael case, by denying the petition of the State of Georgia for Writs of Mandamus and prohibition (probation) to vacate the stay. The nature of issues before the Supreme Court and the significance of this decision are quite apparent.

11. This motion was not filed earlier because of difficulties in my family, and because I was with out assistance during this period in which the volume of work in my office was extremely great.

WHEREFORE, Petitioner respectfully prays:

(a) That the remand order of the United States District Court be forthwith stayed pending a review of the order by the United States Court of Appeals for the Fifth Circuit.

(b) That the Court grant petitioner such other relief as from time to time may appear just and proper.

John D. Due, Jr.
Carl Rachlin
540½ West Brevard St.
Tallahassee

By
John D. Due, Jr.

APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE

vs.

SPIVER GORDON NO. ______________________

PETITION FOR REMOVAL
AND FOR OTHER RELIEF

TO THE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION.

YOUR PETITIONER RESPECTFULLY PETITIONS THIS COURT, PURSUANT TO TITLE 28 U.S.C.A. 1443, ET SEQ., FOR THE REMOVAL OF THE ABOVE-STYLED PROCEEDING TO THIS COURT FROM THE CITY COURT OF THE CITY OF TALLAHASSEE, FLORIDA, AND IN SUPPORT OF THIS PETITION SHOWS AS FOLLOWS;

PART A

A-1. A PROCEEDING, AS ABOVE ENTITLED, IS NOW PENDING AND AWAITING TRIAL IN THE CITY COURT IN THE CITY OF TALLAHASSEE, DOCKET NO. 65-[illegible]; AND IS A CRIMINAL PROCEEDING IN WHICH PETITIONER IS A DEFENDANT.

A-2. PETITIONER IS CHARGED IN SAID CRIMINAL PROCEEDING WITH THE ALLEGED OFFENSE SOLICITING LEWD AND LASCIVIOUS ACTS, TO-WIT, FELLATION.

A-3. THERE IS PRESENTLY IN OPERATION IN THE STATE OF FLORIDA, PARTICALLY IN THE SO CALLED "BIG BEND" REGION, AN ORGANIZATION NAMED AND DESCRIBED AS THE CONGRESS OF RACIAL EQUALITY, BETTER KNOWN AS CORE.

A-4. CORE IS A NEW YORK CORPORATION DEDICATED TO AND ENGAGED IN PEACEFUL AND NON-VIOLENT ACTIVITIES DESIGNED TO ACHIEVE THE FULL AND

COMPLETE INTEGRATION OF NEGRO CITIZENS IN THE POLITICAL AND ECONOMIC LIFE OF THE STATE OF FLORIDA BY MEANS OF IMPROVED EDUCATIONAL OPPORTUNITIES AND EMPLOYMENT OPPORTUNITIES, AND FULL AND ACTIVE PARTICIPATION IN BOTH THE STATE AND FEDERAL FRANCHISE;

A-5. CORE HAS HAD A PROGRAM IN THE STATE OF FLORIDA FOR THE LAST FIVE YEARS AND STILL HAVE AS AN ACTIVE PROGRAM, WHICH AMONG OTHER THINGS, INCLUDES SPONSORING A PROFESSIONAL STAFF OF WORKERS, AND TRANSPORTING TO THE STATE OF FLORIDA VOLUNTEER COLLEGE STUDENTS, TEACHERS, SOCIAL WORKERS, MINISTERS AND LAW STUDENTS TO CONDUCT VOTER REGISTRATION ACTIVITIES; THE CONDUCT OF PEACEFUL ASSEMBLIES, PUBLIC PROTEST AND PICKETING; AND THE PUBLICATION AND DISTRIBUTION OF LITERATURE; ALL INTENDED AND DESIGNED TO ADVANCE THE ABOVE - MENTION PROGRAM IN A PEACEFUL, LAW ABIDING MANNER.

A-6. THE PETITIONER, MR. SPIVER GORDON, IS WELL KNOWN IN THE COMMUNITY, AS BEING THE FLORIDA FIELD SECRETARY FOR CORE, AND BEING THEREFORE, THE PROFESSIONAL DIRECTOR OF THE AFORE MENTION PROJECT. AT ALL TIMES HEREIN MENTION, PETITIONER, AND THOSE ASSOCIATED WITH THAT PETITIONER, WERE MEMBERS, EMPLOYEES AND - OR VOLUNTEERS ACTIVITY ENGAGED IN THE AFORE SAID CORE PROGRAM FOR THE AFORE SAID PURPOSES.

A-7. THE ABOVE - MENTION CORE PROJECT HAS BEEN BITTERLY ASSAILED, CRITICIZED, AND OPPOSED BY OFFICIALS OF THE STATE OF FLORIDA, ITS PUBLIC SUB-DIVISIONS, AND MUNICIPALITIES, WHICH HAVE EITHER BEEN ENCOURAGED BY STATE AUTHORITIES TO OPPOSE, AND HAVE OPPOSED WHEN EVER POSSIBLE, OR HAVE GIVEN ONLY TOKEN ACCEPTANCE OFTHE FORE SAID ACTIVITIES WITHIN THE STATE.

PART B

B-1. ON THE 22ND DAY OF SEPTEMBER, 1965, IN THE CITY OF TALLAHASSEE, FLORIDA, AT APPROXIMATELY 9:30 P.M., MR. SPIVER GORDON, PETITIONER, WAS

ON THE TENNESSEE AND ADAMS STREET IN FRONT OF THE GREYHOUND BUS STATION, INQUERING INTO THE WELFARE OF A NEGRO WOMAN WHO HAD A COMPLAINT OF HAVING BEEN ASSAULTED. WHEREUPON, A WHITE MALE, MR. STANLEY DILLARD, APPROACHED MR. SPIVER GORDON, INTRODUCED HIMSELF, AND ENGAGED IN CONVERSATION WITH THE PETITIONER. MR. STANLEY DILLARD SAID TO MR. SPIVER GORDON; "YOU DO NOT LOOK LIKE JOE LOUIS". THE CONVERSATION THEREFORE PROCEEDED BEING OF THE SAME NATURE, BEING OF A NON-LASCIVIOUS NATURE. THE SAID STANLEY DILLARD, INDICATED TO MR. SPIVER GORDON, THE PETITIONER, STATING THAT HE WAS A STUDENT AT FLORIDA STATE UNIVERSITY, AND BECAUSE OF DIFFICULT STUDIES, IS CONFUSED AND DISTURBED. THE PETITIONER, ALTHOUGH OF THE NEGRO RACE, IS CONCERNED ABOUT THE WELFARE OF HIS FELLOW HUMAN BEINGS, REGARDLESS OF RACE, THE SAID STANLEY DILLARD BEING OF THE WHITE RACE. THEREFORE, THE PETITIONER THEN INVITED MR. DILLARD TO ACCOMPANY HIM FOR A RIDE IN HIS CAR, STATING THAT THIS MAY MAKE THE SAID STANLEY DILLARD FEEL BETTER. WHEN THE WHITE YOUTH THEN BEGIN TO WALK, ACCOMPANYING MR. SPIVER GORDON IN THE DIRECTION OF MR. SPIVER GORDON'S AUTOMOBILE, SPIVER GORDON WAS IMMEDIATELY ARRESTED BY OFFICERS HAINES AND PEACOCK OF THE CITY OF TALLAHASSEE. THE OFFICERS DID NOT ATTEMPT TO ASCERTAIN THE FACTS NOR CAN IT BE REASONABLE THAT A NEGRO AND A PERSON OF THE WHITE RACE, GET TOGETHER SHOWS A REASONABLE SUSPICION AND OFFENSE HAS BEEN COMMITTED. THE ARRESTING OFFICER HAINES RECOGNIZED THE SAID PETITIONER, SPIVER GORDON, WAS ABUSIVE TO HIM, SARCASTICALLY ASKED HIM WHILE HE WAS PLACED UNDER ARREST, SUCH AS THE FOLLOWING: WHY DON'T YOU CALL THE JUSTICE DEPARTMENT OR THE FBI OR MARTIN LUTHER KING. THE SAID SPIVER GORDON WAS TAKEN TO THE POLICE STATION, WAS INTERROGATED BY THE OFFICERS PEACOCK AND HAINES, WITHOUT BENEFIT OF THE PETITIONER HAVING COUNSEL OR WITHOUT THE BENEFIT OF BEING ADVISED THAT HE HAD A RIGHT TO COUNSEL, FURTHER, WAS NOT EVEN PERMITTED TO HAVE COUNSEL UPON REQUEST. THE SAID PETITIONER

WAS NOT RELEASED UNTIL ELEVEN (11:00) P.M. ON BOND OF $300 DOLLARS. HE THEN WAS INSTRUCTED TO APPEAR AT ARRAIGNMENT ON THE 27TH DAY OF SEPTEMBER 1965 AT 9A.M.

THE NEXT DAY, THE PETITIONER, ACCOMPANIED BY HIS COUNSEL, JOHN,D. DUE, JR., AND MR. EMMANUEL BAVES, WENT TO THE POLICE STATION, AND ASKED THE ASSISTANT POLICE CLERK MR. JACKSON, AND A NOTHER POLICEMAN ON DUTY, MR. DOWES, INFORMATION REGARDING THE SAID OFFENSE ALLEGED TO HAVE BEEN COMMITTED BY MR SPIVER GORDON. THE INFORMATION ACQUIRED OF WAS THE NAME OF THE THEN UNKNOWN MR. STANLEY DILLARD. THIS INFORMATION WAS NOT PROVIDED COUNSEL, NOT UNTIL OCTOBER THE 7TH 1965. ON THE SAME DAY, 23RD OF SEPTEMBER 1965, AT 9:30 P.M., JOHN D. DUE, JR., REPRESENTING MR. SPIVER GORDON, THE PETITIONER AND ACCOMPANIED BY THE PETITIONER, WENT TO THE SAID GREYHOUND BUS STATION, WHEREUPON THE PETITIONER IDENTIFIED THE WHITE YOUTH WITH WHOM HE HAD SPOKEN WITH THE PRECEDING EVENING. THE SAID WHITE YOUTH WAS THEN AND THERE STANDING IN FRONT BUS STATION. I INTRODUCED MY SELF TO THE WHITE YOUTH WHO THEN AND THERE ADMITTED SPEAKING WITH MR. SPIVER GORDON, BUT BEFORE I COULD INQUIRE AS TO HIS NAME, HE QUICKLY RAN TO A CAR WHICH DROVE UP QUICKLY AND PARKED IN FRONT OF THE BUS STATION TO RECEIVE HIM. THE WHITE YOUTH JUMPED INTO THE BACK SEAT OF THE CAR. I RECOGNIZED IT WAS APPARENT, THAT THE DRIVER IN THE AUTOMOBILE WAS A POLICE OFFICER. JOHN DUE SPOKE WITH THE OFFICER, WHOSE NAME IS OFFICER HAINES, ASKING PERMISSION TO SPEAK WITH THE YOUTH. OFFICER HAINES REFUSED JOHN DUE, AND WHEN IT WAS APPARENT THAT THE YOUTH HAD NO AUTHORITY TO LEAVE THE CAR SO THAT JOHN DUE COULD CONTINUE SPEAKING WITH HIM, JOHN DUE ASKED THE OFFICER WHETHER THE BOY WAS UNDER ARREST. OFFICER HAINES SAID NO, AND BECAUSE OF THESE CIRCUMSTANCES.

3-b THE AFORESAID CONDUCT AND ACTIVITY OF THE PETITIONER FOR WHICH THE PETITIONER WAS ARRESTED AS HEREIN SET FORTH WAS DONE IN THE EXERCISE OF CIVIL LIBERTY AND RIGHTS GUARANTEED TO THE PETITIONER BY THE

FEDERAL CONSTITUTION AND STATUES, INCLUDING TITLE 42 U.S.C. 1981 AT SEQUENCE AND AMENDMENTS THERETO, AND THE CIVIL RIGHTS ACT OF 1964;

B-3. NOTWITHSTANDING THE LAWFULNESS OF PETITIONER'S CONDUCT AS AFORESAID, PETITIONER WAS ARRESTED AND FALSELY IMPRISONED BY LAW ENFORCEMENT OFFICERS OF THE CITY OF TALLAHASSEE; HAS BEEN CHARGED AS SET FORTH ABOVE WITH BAIL REMAINING FIXED IN THE AMOUNT OF $300; AND THE TRIAL OF PETITIONER HAS BEEN SET FORTH FOR 2 P.M., FRIDAY, THE 9TH DAY OF OCTOBER.

PART C

C-1. THE ARREST AND PROSECUTION OF PETITIONER HAS BEEN AND IS BEING CARRIED ON FOR THE SOLE PURPOSE AND EFFECT OF DEFAMING, HARASSING, AND PUNISHING THE PETITIONER FOR AND DETERRING HIM FROM THE EXERCISE OF HIS PROTECTED RIGHTS TO PROTEST AND CORRECT THE CONDITIONS AND RESULTS OF RACIAL DISCRIMINATION WHICH EXIST IN MATERIAL ASPECTS OF LIFE IN THE STATE OF FLORIDA AND WHICH THE STATE OF FLORIDA CONTINUES TO MAINTAIN IN THE CITY OF TALLAHASSEE AND SEEKS TO ENFORCE BY STATUES, BY ORDINANCE, REGULATIONS, CUSTOMS, USAGE, AND PRACTICE.

C-2. AMONG RECENT LEGISLATIVE ACTION BY THE CITY OF TALLAHASSEE, EVIDENCING TALLAHASSEES POLICY TO CONTINUE THE EFFECTS OF RACIAL DISCRIMINATION AND SEGREGATION AS THE DELIBERATE ACT BY THE CITY OF TALLAHASSEE TO CLOSE THE MUNICIPAL SWIMMING POOLS AS DESCRIBED IN *ROCHELLE STEELE* v. GEORGE E. TAFT CIVIL CAUSE NO.1073, FILED IN THIS VERY SAME COURT.

C-3. PETITIONER SEEKS REMOVAL OF THE ABOVE CRIMINAL PROCEEDINGS TO THIS COURT PURSUANT TO SUB-SECTION (1) OF TITLE 28 U.S.C.A. SECTION 1443, COMMONLY KNOWN AS THE CIVIL RIGHTS REMOVAL STATUE, UPON THE GROUND THAT THE PETITIONER HAS BEEN DENIED, IS BEING DENIED, AND CANNOT ENFORCE IN THE COURTS OF THE STATE OF FLORIDA RIGHTS GUARANTEED AND

SECURED TO HIM UNDER FEDERAL CONSTITUTION AND LAWS PROVIDING FOR EQUAL PROTECTION OF ALL CITIZENS OF THE UNTIED STATES AND OF ALL PERSONS WITHIN THE JURISDICTION OF THE UNITED STATES, IN THAT;

a. THE COURTS OF FLORIDA AND THE LAW ENFORCEMENT OFFICERS OF STATE ARE HOSTILE TO AND PREJUDICED AGAINST PETITIONER'S IDENTIFICATION AND ASSOCIATION MEMBERS OF THE OTHER RACE, AND ALSO BY REASON OF THE COMMITMENT OF THOSE COURTS AND SPECIFICALLY THE CITY COURT OF TALLAHASSEE, AND THOSE OFFICERS TO ENFORCE THE CITY OF TALLAHASSEE S DECLARED POLICY OF ATTEMPTING TO CONTINUE RACIAL DISCRIMITION AND SEGREGATION AS DESCRIBED IN APPARENT FROM THE CLOSING OF THE MUNICIPAL SWIMMING POOLS.

b. THE PETITIONER IS CHARGED WITH THE CRIME WHICH IS COMMONLY DESCRIBED AS THE CRIME AGAINST NATURE. TO BE SO CHARGED OWES UP THE PETITIONER UP TO SHAME AND RIDICULE IN HIS COMMUNITY WITH THE AFFECT OF DESTROYING OF HIS EFFECTIVENESS IN THE COMMUNITY ON BEHALF OF CORE.

ON THE 7TH DAY OF OCTOBER, 1965, JOHN DUE, ATTORNEY FOR THE PETITIONER PRESENTED AN ARGUED A MOTION TO DISMISS BEFORE THE HONORABLE EDGAR BOOTHE, JUDGE, OF THE CITY COURT OF THE CITY OF TALLAHASSEE, FLORIDA. ATTACHED TO THIS PETITION IS THE MOTION TO QUASH DESCRIBED AS EXIBIT I. THE HONORABLE EDGAR BOOTHE, DENIED THE PETITION OF REMOVAL STATING TO THE COUNSEL AND TO THE PETITIONER AMONG OTHER THINGS, THAT THE SAID PETITIONER MUST SEEKS PROTECTION OF HIS CIVIL RIGHTS IN THE FEDERAL COURTS AND NOT IN HIS COURT.

THEREFORE, THE CITY OF TALLAHASSEE, FLORIDA, THROUGH ITS JUDGES, COUNTY PROSECUTORS, AND ARRESTING OFFICERS, UNDER THE GUISE OF PROSECUTING THE PETITIONER UNDER THE CHILD MOLESTER ACT OF CHAP. 800, ARE USING AND ABUSING THE LAWS OF THE STATE OF FLORIDA IN AN ATTEMPT TO DEPRIVE THE PETITIONER OF DUE PROCESS IN EQUAL PROTECTION OF THE LAWS BY ARBITRARY ARREST AND IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT CALCULATED TO DETER THE PETITIONER AND THE ORGANIZATION WHICH HE REPRESENTS FROM THE EXERCISE OF HIS CIVIL AND POLITICAL RIGHTS UNDER THE CONSTITUTION AND TO BREAK HIM FOR THE PAST EXERCISE OF SUCH RIGHTS --

ER IN VIOLATION OF THE FIRST, EIGHTH, FOURTEENTH ADMENDMENTS TO THE CONSTITUTION AND OF THE FEDERAL CIVIL RIGHTS ACT. 42 U.S.C.A. SECTION 1983.

C-4. PETITIONER, FURTHER SEEKS REMOVAL OF THE ABOVE CRIMINAL PROCEEDINGS TO THIS COURT PURSUANT TO SUB-SECTION TWO OF TITLE 28 U.S.C.A. SECTION 1443, AND UPON THE GROUNDS THAT THE AFORESAID CONDUCT OF PETITIONER WAS ENGAGED BY HIM UNDER COLOR AUTHORITIES DERIVED FROM THE FEDERAL CONSTITUTION AND LAWS PROVIDING FOR EQUAL RIGHTS OF AMERICAN CITIZENS WITHOUT REGARD TO RACE, CREED OR COLOR; IN THE ABOVE CITY COURT PROSECUTION OF PETITIONER RESULTS FROM PETITIONER REFUSAL TO DESIST OR FOREGO SUCH CONDUCT ON THE GROUND THAT TO DO SO WOULD BE INCONSISTANT WITH THE AFORESAID CONSTITUTION AND LAWS (TITLE 42 U.S.C.A., SECTION 1981 ET SEQ.) IN THE FOLLOWING PARTICULARS AMONG OTHERS;

a. THE ACTS FOR WHICH PETITIONER IS BEING HELD TO ANSWER AS A CRIMINAL OFFENSE OR OFFENSES AS DESCRIBED IN THE PRECEDING PARAGRAPHS, INSOFAR AS THE OFFENSES CHARGED HAVE ANY BASIS IN FACT, ACTS DONE IN THE CONSTITUTIONALLY PROTECTED EXERCISE OF PETITIONER'S RIGHT TO BE FREE OF DISCRIMINATION AND SEGREGATION PROHIBITED BY THE FOURTEENTH AMENDENT TO THE FEDERAL CONSTITUTION AND THE RIGHT TO EXERCISE THE FREEDOM OF SPEECH, ASSEMBLY, AND PETITION GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND 42 U.S.C.A. 1981, ET SEQ.;

b. INSOFAR AS THE OFFENSES CHARGED AGAINST PETITIONER ARE BASED ON ALLEGATIONS OF CONDUCT NOT PROTECTED BY THE FEDERAL CONSTITUTION AND LAWS CITED, THESE ALLEGATIONS ARE GROUNDLESS IN FACT AND THE PROSECUTION OF PETITIONER AND/OR THE SUBJECTION OF PETITIONER TO SUCH PROSECUTION DENIES PETITIONER THE DUE PROCESS AND THE EQUAL PROTECTION OF THE LAW;

c. CONVICTION OF PETITIONER OF THE CHARGE AGAINST HIM HAS AND WILL PUNISH HIM FOR THE EXERCISE OF RIGHTS, PRIVILEGES AND IMMUNITIES SECURED BY THE THE FEDERAL CONSTITUTION AND LAWS, AND HAS AND WILL DETER HIM AND OTHERS SIMILARLY SITUATED FROM THE FUTURE EXERCISE OF THEIR

FEDERALLY PROTECTED RIGHTS, PRIVILEGES AND IMMUNITIES;

d. IF THE FLORIDA STATUTE OR ORDINANCE UNDER WHICH PETITIONER IS CHARGED IS CONSTRUED TO MAKE PETITIONER'S ABOVE-MENTIONED CONDUCT CRIMINAL, THOSE STATUTES OR ORDINANCES ARE UNCONSTITUTIONAL ON THEIR FACE AS APPLIED;

(1) SAID STATUTE OR ORDINANCE ARE TOO VAGUE, INDEFINITE, AND UNCERTAIN FOR FAILING TO PROVIDE AND ASCERTAINABLE STANDARD OF GUILT AND TO SET FORTH THE BOUNDS OF THE FORBIDDEN -- THEREBY DENYING THE NOTICE OF CONDUCT WHICH IS TO BE AVOIDED UNDER LAW TO POTENTIAL DEFENDENTS AND CONCERNING A LIMITED DISCRETION ON THE POLICE, THE PROSECUTING ATTORNEY, AND THE CITY JUDGE, MAKING A MARKERY OF THE CONCEPT OF "GOVERNMENT OF LAWS AND NOT OF MEN".

(2) THE SAID STATE STATUTE OR ORDINANCES AND PLEDGES THE FREEDOM OF SPEECH, ASSEMBLY, AND ASSOCIATION PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENT, SUBJECTING THE PETITIONER TO CONVICTION MERELY BECAUSE HE WAS IN THE PRESENCE OR WAS IN ASSOCIATION WITH A MEMBER OF THE CAUCASIAN RACE.

e. IF THE SAID STATUTES ARE CONSTRUED SO AS TO SAVE THEIR CONSTITUTIONALITY UNDER FEDERAL CONSTITUTION, THERE IS NO EVIDENCE UPON WHICH PETITIONER MAY BE CONVICTED CONSISTENT WITH THE DUE PROCESS OF LAW REQUIRED BY THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION;

WHEREFORE, YOUR PETITIONER, DEFENDED HEREIN, REQUEST THIS COURT ASSUME FULL JURISDICTION OVER THE CAUSES HEREIN PROVIDED BY LAW.

JOHN D. DUE, JR., COUNSEL FOR
PETITIONER
540½ West Brevard Street
TALLAHASSEE, FLORIDA

OF COUNSEL:

CARL RACHLIN
38 PARK ROW
NEW YORK 38, NEW YORK

$1.00

9-22-, 1965 Docket No. 65-9767

RECEIVED OF John Doe

One — DOLLARS

Bond ☐

Fine ☐

Days Served

Photostatic copy of above Comm.

Spiver Whitney Gordon

TALLAHASSEE POLICE DEPARTMENT

№. 2062

By Jackson

12 Books—3/65—Artcraft Printers

ARREST RECORD

TALLAHASSEE POLICE DEPARTMENT

Arrest No. 65 [illegible]

I.D. No.

Last Name	First Name	Middle Name	Weight	Height	Hair	Eyes	Comp.
Gordon	Spiver	Whitney	200	5'9"	Blk	Brn	Light

Residence	Sex	Race	Age
Route 3, Box 428 F, Quincy Gadsden, Fla	M	C	26

FPC

Occupation	Place of Birth	Date of Birth
Cons. Sec	Louis, Plazuemine	8-24-39

Charge: Solicit for lewd and lascivious act, to-wit, fellation.

Place of Offense	Date	Time
Tenneas and Adams St	9-20-65	9:30PM

Scars, Marks or Tatto

Place Arrested	Date	Time	Arresting Officer
Same as above	" " "	" " "	PEACOCK AND HANES

Released on Bond $300.00 Committed To Appear 9-27-65 At 9AM

Cash Receipts No. Date Released M

Signed Time M Date 19

Remarks:

Thumb

Sgt. Peacock

Police Department, Tallahassee, Florida

Court D[illegible]t No.

NAMES OF PROSECUTING WITNESSES	ADDRESS	TELE
9-22-65 Certified to be a true copy of charge. R. E. Jackson Clerk in City Court Office.		

FINAL DISPOSITION

Plea G. N.G. F.O

Found Guilty of M.O

Term of Sentence Mo. Days Fine $ Probation

Discharged (Reason For)

Other Disposition

Judge Court Date 19

Property—Keys Weapons Jewelry, Etc.

Cash

Artcraft Printers—18M—4/64 Receipt of Property

DEC 23 1965

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE :

vs. :

SPIVER GORDON : TALLAHASSEE CRIMINAL NO. 2732

- - - - - - - - - - - - - - - :

ORDER OF REMAND

This cause came on for hearing, pursuant to notice, on motion for remand, and counsel for the respective parties were present and heard. Testimony was invited and received with respect to the essential allegations for the petition for removal and with respect to the issues raised by the motion for remand. Counsel submitted authorities and argued fully their respective positions.

At the conclusion of the hearing the Court entered findings of fact and conclusions of law which, in essence, found as a fact that the prosecution of Spiver Gordon on the instant charge in Municipal Court in and for the City of Tallahassee was not predicated upon harassment, intimidation, or discrimination directed at either Spiver Gordon or any organization of which he may have been a member. Conversely, the Court finds as a matter of fact that the prosecution in the Municipal Court in and for the City of Tallahassee came about in a routine manner and was predicated upon reasonable grounds. This finding in no way impairs or prejudices the right of Spiver Gordon to a full and fair trial in the Municipal Court in and for the City of Tallahassee, Florida, nor may it in any way be used as evidence against this defendant. The sole issue before this Court on this hearing was whether a statute of the State of Florida, and an ordinance thereunder duly promulgated by the City of Tallahassee, Florida was unconstitutionally applied to Spiver Gordon.

Upon the facts found and upon the authority of Peacock v. City of Greenwood, 347 F. 2d 679 (5th Cir. 1965), the Court concludes that the petition for remand should be granted.

It is, therefore, upon consideration, hereby

ORDERED that petition for remand of this cause to the Municipal Court in and for the City of Tallahassee, Florida be and it is hereby granted and this cause is hereby remanded to said court.

DONE AND ORDERED in Chambers at Tallahassee this 22nd day of December 1965.

G. HARROLD CARSWELL

G. HARROLD CARSWELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

CITY OF TALLAHASSEE

Plaintiff

vs

SPIVER GORDON

Defendant

CRIMINAL
NUMBER 2732

NOTICE OF APPEAL

The Defendant named in the above-numbered removed case hereby appeals to the United States Courts of Appeals for the Fifth Circuit from the order of this Court, Honorable Harold Carswell, on the 29th day of December, 1965, remanding this cause to the Municipal Court of the City of Tallahassee, Florida.

John D. Due, Jr.
Carl Rachlin
540½ West Brevard Street
Tallahassee, Florida

Collins, Douglas & Ely
2211 Dryades St.
New Orleans, La.

By ________________________
John D. Due, Jr.

Dated this 29th day of December, 1965.

APPENDIX "A"

PETITION FOR REMOVAL AND OTHER RELIEF

Identical to Appendix "A" included heretofore, and so omitted at this point.

APPENDIX "B"

PETITION TO REMAND

Identical to Appendix "B" included heretofore and so omitted at this point.

APPENDIX "C"

MEMORANDUM OF LAW IN OPPOSITION TO REMAND

Identical to Appendix "C" included heretofore

and so omitted at this point.

APPENDIX "D"

ORDER OF REMAND

Identical to Appendix "D" included heretofore and so omitted at this point.

APPENDIX "E"

NOTICE OF APPEAL

Identical to Appendix "E" included heretofore and so omitted at this point.

1966, January 17]

APPENDIX "F"
(Followed by its own appendices "A" to "K")

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Tal. Crim. No. 2732

CITY OF TALLAHASSEE

-v.-

SPIVER W. GORDON

MOTION FOR RECALL OF ORDER OF REMAND AND FOR A STAY PENDING APPEAL

1. On October 8, 1965, a petition was filed in this, the United States District Court, for the Northern District of Florida, seeking to remove a city offense prosecution, pending in the Municipal Court of the City of Tallahassee, Florida, against Spiver W. Gordon arising from his arrest on September 27, 1965 on the charge of "solicit (sic.) for lewd and lascivious act, to-wit, fellation." The jurisdiction of the District Court was invoked under 28 U.S.C. §1443 (1) and (2) (1958).
2. Acopy of the removal petition is annexed hereto as Appendix "A", and allegations of the petition are hereby incorporated by reference.
3. On November 19th, 1965, a petition to remand was filed in this Court by the Attorney for the City of Tallahassee. A copy of said petition to remand is annexed hereto as Appendix "B". The petition to remand did not contest the factual allegations of the removal petition but merely questioned the legal sufficiency of the petition.
4. Argument on the motion for remand was set for December 22nd, 1965, and counsel for petitioner submitted a memorandum of law in opposition to the motion to remand annexed hereto as Appendix "C". This District Court, Hon. G. Harrold Carswell, Judge, presiding, called, over the objections of petitioner, for evidence on the

truth of the allegations set forth in the removal petition, but did not hear arguments on the legal sufficiency of the petition. The Court refused to grant a continuance to allow petitioner to present evidence in support of the allegations in his petition for removal.

5. On December 23rd, 1965, the Hon. G. Harrold Carswell ordered the case remanded to the Municipal Court for the City of Tallahassee. A copy of the order is appended as Appendix "D". Notice of appeal was filed in the District Court on December 29, 1965. A copy of said Notice is annexed hereto as Appendix "E".

6. As stated previously in point (3), the motion to remand raised no issues of fact and hence, an evidentiary hearing was uncalled for. Even had such a hearing been justified, counsel for petitioner had no notice thereof. Rather, he was led to expect only an argument on the question of whether or not the petition for removal stated adequate grounds for removal as a matter of law. (see Appendix "F") Considering the nature of the motion to remand and the issues raised thereby, the factual allegations of the removal petition should have been taken as true.

7. Had the motion to remand controverted the factual allegations of the removal petition thus creating an issue for an evidentiary hearing, and had the petitioner been duly notified that such a hearing was to be held, and had he been granted adequate opportunity to present evidence supporting the allegations of the removal petition, the petitioner would have presented inter alia evidence as appears in the affidavits appended as Appendices "F" through "K" showing:

   (a) That due to the hostility of the Municipal Court to people active in the civil rights movement, petitioner would have been unable to raise objections to denials of his federal rights.

(b) That the prosecution of the petitioner was part of a continuous pattern of official hostility designed to harrass and intimidate people active in the civil rights movement from purduing equal protection of the laws.

(c) That the charges against the petitioner was an unconstitutional application of the statute.

all of which are alleged in the petition for removal and any of which constitute adequate grounds for removal as a matter of law, since they show a "... planned prosecutional abuse of a (state criminal) statute." *Dombrowski* v. *Pfister*, 380 U.S. 479, 85S.Ct. 1116, 14L.Ed.2d 22 (1965); *Cox* v. *State of Louisiana*, 348 F2d 750 (5th Cir. 1965).

8. Thus, unless the order of remand is recalled and is stayed forthwith, petitioner will suffer an irreparable injury. The pending criminal charge is now set for trial in the Municipal Court of the City of Tallahassee on January 20, 1966. Prosecution in the Municipal Court serves no legitimate State or City concern if the removal is proper. It does - (a) take petitioner to trial, in a forum in which Congress has directed that he not be tried, and in which he cannot effectively enforce his federal constitutional and statutory rights, (b) subject him to the restraints of the state criminal process during the very period, when his right to federal removal is being tested, (c) potentially moot the question of the propriety of the removal, and, (d) thus punish him for excercising, and inhibit the excercise in the future, of his 1st and 14th Amendment freedoms, and those of his associates.

9. Stays pending appeal of remand orders in similar cases have recently been issued in *Baines* v. *Danville*, 321 Fed. 2nd 643 (4th Cir. 1963), *Rachael* v. *Georgia*, 342

F2d.336 (5th Cir., 1965); *Georgia* v. *Tuttle*, 32 U.S.L. Week 3446 (decided June 22, 1964); and in *Cox* v. *Louisiana*, 348 F2d. 750 (5th Cir., 1965); the Supreme Court sustaining the Court of Appeals in the Fifth Circuit in the *Rachael* case, by denying the petition of the State of Georgia for Writs of Mandamus and prohibition (probation) to vacate the stay. The nature of issues before the Supreme Court and the significance of this decision are quite apparent.

WHEREFORE, Petitioner respectfully prays:

(a) That the remand order of this Court be forthwith recalled and stayed pending a review of the order by the United States Court of Appeals for the Fifth Circuit.

(b) That the Court grant petitioner such other relief as from time to time may appear just and proper.

John D.Due, Jr.
Carl Rachlin
540½ West Brevard Street
Tallahassee, Florida

By
John D. Due, Jr.

THE FOLLOWING DOCUMENTS ARE THE
BEST AVAILABLE.

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE

-v.-

SPIVER W. GORDON

AFFIDAVIT IN SUPPORT OF MOTION FOR RECALL OF ORDER OF REMAND AND FOR A STAY PENDING APPEAL

Before me, the undersigned authority, a Notary Public for the County of Leon, State of Florida, personally came John D. Due, Jr., Esq., who, after first being by me duly sworn, deposes and says:

I

1. I am an attorney admitted to practice in the State of Florida and in the District Courts and Courts of Appeal of the United States.
2. I am an attorney for the Congress of Racial Equality, Scholarship, Education, and Defense Fund (hereinafter referred to as CORE or CORE SEDF) commonly referred to as a civil rights organization.
3. I am the attorney for Spiver W. Gordon and represent him in the present case.
4. Both Spiver W. Gordon and I are Negroes.
5. I have been engaged in the practice of law in and around the City of Tallahassee, State of Florida, for 2½ years, and have resided in the community for approximately 5 years and have become familiar with the attitudes and customs of the community. I have appeared frequently in the Municipal Court in and for the City of Tallahassee on behalf of my clients and as an observer and am familiar with the customs and practices of that court.

II

6. In my capacity as attorney for Spiver W. Gordon, I

appeared in the Municipal Court in and for the City of Tallahassee, Hon. Edgar Booth, Judge, presiding, on or about the 27th day of September, 1963. The purpose of my appearance on this day was to argue in support of a motion to quash the charge against the petitioner. The Judge, by his comments and demeanor conclusively indicated that he was not impartial. In denying the motion, the Judge said, inter alia, "I am not here to protect the civil rights of the Petitioner, I am here to uphold the City Ordinances. He will have to go to the Federal Courts for that." Although the above quote is substantially correct, the exact words used may have been slightly different.

7. I have noted what I believe to be a consistent and continuous pattern of discrimination and disrespect directed toward Negroes in the Municipal Court of Tallahassee. Typical as an expression of this pattern is the fact that Negroes are commonly addressed by their first names, while whites are commonly addressed as "Mr." or "Mrs.".

8. People who participate in civil rights activities have on several occasions been referred to by the Court as "communist agitators".

9. It has been my experience and observation as an attorney and as a resident of the community that, on information and belief, crimes and offenses by whites against the persons or property of Negroes are not as a matter of policy prosecuted or investigated effectively, and thus the Negro community is denied effective protection. However, where there is even the slightest indication that a Negro has committed an offense against the person or property of a white person, the most diligent efforts at prosecution are excercised.

III

10. As an attorney, and as a resident of the community, I have observed the consistent denial of civil rith
g ts

to persons active in civil rights organizations and to Negroes generally by the police, the courts, and various other agencies of the City of Tallahassee. On numerous occasions in which civil rights demonstrations have been held, I have observed the police assault demonstrators and workers, "ticket" their cars (on one occasion ten summonses for overtime parking were placed on a car within one hour), follow and disturb them even while demonstrations were not in progress and otherwise harrass and attempt to intimidate them. On two occasions, I observed police stand by as civil rights demonstrators were attacked by hoodlums. On one of these occasions, the attack occurred less than one block from the police station. On many occasions when demonstrations took place the demonstrators were arrested on charges of unlawful assembly and/or disorderly conduct, although they were engaged in nothing more then the "peaceful expression of unpopular views." Commencing in 1964, CORE began a voter registration campaign Registration workers, and their cars were followed (particularly where the occupants of the car were of different races) and harrassed repeatedly. The cars were stopped and examined, and the occupants were questioned. On information and belief, the city police have kept a "blacklist" of persons engaged in civil rights activities, and subjected persons on the list to particular harrassment. If such persons were arrested, they are, on information and belief, prosecuted to the full extent of the law with an eye to the imposition of maximum penalties.

11. I have personally been the victim of official harrassement on several occasions. My car, which has been been used extensively in civil rights activities has been stopped several times for "safety inspections", "tickets" were given for presumed violations. My former

secretary, who is white, was arrested on a charge of "running a red light", was given the maximum penalty even though it was her first offense, after it became known that she was my secretary. She has been subjected to harrassment on other occasions.

IV

12. The present case was removed to the United States District Court for the Northern District of Florida, on October 8th, 1965. A motion to remand was filed on November 19th, 1965.

13. A notice of hearing on the motion to remand was filed in this court on or about November 29th, 1965. Said notice called for a hearing on December 12th, 1965. counsel for the City of Tallahassee, herein, certified on the notice that a copy had been served on me as counsel for Spiver W. Gordon, the petitioner.

14. In fact, no notice of hearing was served on me or on any member of my staff or on the petitioner himself, either personally or by mail; nor did I receive any information that a hearing had been noticed until December 20th, 1965. At that time, in the course of a telephone conversation with the Hon. G. Harrold Carswell, Judge of the United States District Court for the Northern District of Florida, the Judge informed me that he was ready to hold a hearing on the motion to remand. The hearing was reset for December 22nd, 1965.

15. On December 22nd, 1965, I appeared in behalf of Spiver W. Gordon, the petitioner, for the purpose of arguing in support of the legal sufficiency of the removal petition and in opposition to the motion to remand. I filed a "memorandum of law in opposition to motion remand."

16. To my surprise, the Court, Hon. G. Harrold Carswell, Judge, presiding; requested evidence with respect to the truth of the allegations contained in the removal petition. I objected to the taking of evidence on the ground that the motion to remand did not controvert the factual allegations of the removal petition, but merely challenged its legal sufficiency, and hence there was no issue of fact to be examined. I also objected on the ground that I did no expect and had no notice that evidence of the veracity of the allegations of the removal petition were denied by the court and my requests for a continuance for the purpose of arranging to present witnesses were refused.

17. On December 23, 1965 the court ordered the case remanded.

18. Unless the remand order is recalled and stayed pending appeal, the petitioner will be forced to go to trial in a court, and in an atmosphere in which he will have virtually no chance of securing equal justice and proving his innocence.

John D. Due, Jr.

Sworn to before me this 17th day of January, 1966.

Notary Public, State of Florida at Large
My Commission Expires July 29, 1968

APPENDIX "G"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE

-v.-

SPIVER W. GORDON

AFFIDAVIT IN SUPPORT OF MOTION FOR RECALL OF ORDER OF REMAND AND FOR A STAY PENDING APPEAL

Before me, the undersigned authority, a Notary Public for the County of Leon, State of Florida, personally came Linda Weintraub who, after first being by me duly sworn, deposes and says:

1. She is a member of the White Race,and she resides in Tallahassee, Florida.
2. She is a mother and the sole supporter of herself and her child.
3. She has an active interest in civil rights, civil liberties, and human relations, and has worked for various groups which support these causes as a volunteer and as an employee.
4. From about September 20, 1965 until December 20, 1965, she was employed by John D. Due,Jr., a Negro and an attorney at law, who is counsel for the Congress of Racial Equality, (S.E.D.F.) and is representing Spiver W. Gordon in a Federal Petition of Removal, Spiver W. Gordon v. City of Tallahassee.
5. She possesses a driver's license and never has been charged with violating a driving offense in the City of Tallahassee until on or about December 7, 1965.
   (a) She was charged with making an illegal left turn on that date. She appeared before the Honorable Edgar Booth, Judge, Municipal Court, City of Tallahassee.
   (b) She, being informed that it is the practice in the

above Court that if charged with a driving offense, and if it is the first offense, and if one pleas guilty to the charge, one is either given a suspended sentence, or is fined $5.00, remainder of the sentence suspended upon attending a traffic school. She, Linda Weintraub, acting upon such information with the belief that such court practice would be applied to her, decided to plea guilty to the above said driving charge.

(c) The following proceedings occured after she, Linda Weintraub, presented herself before the Honorable Edgar Booth, the clerk to the Municipal Court, Lieutenant James Maige read the charge, and when asked by Judge Booth as to whether her plea was "guilty" or "not guilty", she then answered "guilty".

Hon.E.Booth: I see only a previous suspended parking ticket.

L.Weintraub: Yes.

Hon.E.Booth: Are you a student?

L.Weintraub: No, not now, I am working.

Hon.E.Booth: For whom are you working?

L.Weintraub: I work for an attorney.

Hon.E.Booth: Attorney who?

L.Weintraub: Attorney John Due.

Hon.E.Booth: $25.00 or 25 days.

L.Weintraub: I don't have $25.00. I am separated and have to support my child. Rather than pay the $25.00, can some arrangement be made such as my going to a driving school?

Hon.E.Booth: No. Do you know how to type and do you know shorthand?

L.Weintraub: Yes.

Hon.E.Booth: How much does John Due pay you?

L.Weintraub: $50.00 per week.

Hon.E.Booth: You can get another job.

L.Weintraub: I am looking for a better paying job.

Hon.E.Booth: Well, you get another job and then come see me.

The words used above are,to the best of her recollection, of the proceedings that took place in Linda's case, though the words above may not have been the exact words used at the time.

(d) When she, Linda Weintraub, then was excused and was leaving the court room, another clerk, and an officer who was laughing during the whole time of the proceedings, from the time she stated that she worked for Attorney John Due, stopped her and told her that her sentence was, "continued for 90 days" and also told her that as soon as she finds another job during that period, she was to "see" him.

5. She further states that officials and the City of Tallahassee, including the police and the Municipal Court:

(a) Support the custom and practice in the City of Tallahassee of racial discrimination in public and private employment and use police powers and judicial processes to deny, persecute, and punish those who are apposed to such a custom and practice, such as Linda Weintraub, who was employed, contrary to such customs and practices, and who because of such reasons was denied "equal protection of the law" and was denied a fair trial.

(b) Are hostile and do not tolerate persons who advocate unpopular causes, or who do not conform to custom and policies which deny freedom of speech and freedom of association and behavior, who herself, because of advocating unpopular causes, freedom of speech and freedom of association, behavior, was denied equal protection of the law and denial of a fair trial.

7. . She hereby incorporates by reference and makes a part here of the excerpt from "Report on Florida" by the Advisary Committee to the United States Commission On Civil Rights (August, 1963), marked Appendix "G_1".

Linda L Weintraub

Linda Weintraub

Sworn before me this 15th day of January, 1966.

Arnett C Greene

Notary Public, State of Florida at Large
My Commission Expires July 29, 1968

ARNETT C GREENE

EXCERPT: "REPORT ON FLORIDA" by the Advisory Committee to
United States Commission On Civil Rights (August, 196

EXHIBIT
APPENDIX "G"

THE TALLAHASSEE STORY

The atmosphere in Tallahassee does not promote the expression of any opinions that vary, however slightly, from established orthodoxy. This restricted intellectual climate is due in part to a committee of the legislature known as the Johns Committee which was established in 1955, primarily to investigate the National Association for the Advancement of Colored People. The Committee's harassment of the NAACP was finally halted by the U.S. Supreme Court in the Gibson case.[6] It had been checked previously by the Florida Supreme Court in the Graham case.[7] The Johns Committee's current inquiries deal mainly with alleged homosexuality at the universities, teaching methods, and textbook content.

The Tallahassee police force, which cooperates closely with the Johns Committee in its investigations, has dealt harshly with sit-in demonstrations at bus stations, the airport, and lunch counters throughout the city.

Generally, adult Tallahassee Negroes are afraid to participate in civil rights demonstrations, because so many of them are dependent on the State for their livelihood--particularly at Florida A & M University. Professors who tried to participate in the early student demonstrations were called in one by one by the university president and admonished for their actions. Pressure had been put on the president by the city to end teacher encouragement of these demonstrations. A professor from the university also told the Committee about the "wide schism between the town and gown," including Florida State University as well as the Negro college.[8]

Negroes in Tallahassee are constantly beset by segregation problems which do not "make the big courts." For example, the city's urban renewal program, designed to clean out the worst Negro slums in an area of the city called Smokey Hollow and replace them with decent homes, was scrapped in favor of an extension of the Capitol buildings by the State.

The Committee heard of numerous instances in which Negroes received inequitable treatment at the hands of State and local government in Tallahassee. In one case, a Negro high school girl received notice that she had been accepted as a page for the 1963 Session of the Legislature. When she went with her parents to claim the position, a legislative clerk rudely told her that there had been a mistake and tore up her invitation in front of her.

e to the
t, 1963).

An A & M coed, wife of a law student there, told the Committee of her recent attempts to enter a downtown Tallahassee theater with two male Negro university students, after a white friend had bought tickets for them. The three students were barred by the manager. The police were called, and the students' tickets were forcibly taken from them and torn up. They were arrested on charges of "criminal trespass," with an added charge for the boys of resisting arrest. The girl told the Committee that her arm had been twisted by a policeman when he took her ticket from her. She went on to testify that she and the other Negro students were ordered out of the white section of the city courtroom, although it had been understood that the courtroom was supposed to have been desegregated by a "gentlemen's agreement."

In May 1963, hundreds of students from the college staged a march past the stately Capitol Building to the downtown area, singing and clapping their hands. A minor clash with angry whites was stopped by the police. Another march was staged the next night, with 250 Negroes going to jail after a theater owner obtained an injunction against their obstruction of his business. A circuit court judge later ruled, however, that the protests by the students were within the law as long as they were peaceful.

Near Tallahassee, Negroes are still forbidden to launch boats at the ramp in Killcarn Gardens, a State Park with a beautiful lake for water skiing and fishing. The Park's Negro patrons are told to go 80 miles away to a segregated Gulf facility or to be patient and wait until the city completes a Negro recreational center just 40 miles distant.

The explosiveness of the situation in the State's capital is clearly depicted by a Daytona Beach business man in the following exerpt from a letter he wrote to a member of the Advisory Committee: "I spent 4 days recently in Tallahassee, which is truly sitting on a powder keg. The State, Leon County and the city ought to move rapidly to pull out the fuse and dampen the powder before there is a disasterous blow-up."

PRIVATE EMPLOYMENT

Discrimination in private employment is widespread. Private employers persist in hiring Negroes as menial wage earners only. According to a survey of Miami made by Mrs. Ruth Perlmutter, dated May 1962, three out of four Negroes are working as unskilled

APPENDIX "H"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE

-v.-

SPIVER W. GORDON

AFFIDAVIT IN SUPPORT OF MOTION FOR RECALL OF ORDER OF REMAND AND FOR A STAY PENDING APPEAL

Beforeme the undersigned authority, a Notary Public for the County of Leon, State of Florida, personally came Sidney Daniels who, after first being by me duly sworn, deposes and says:

1. I have been a resident of Tallahassee for approximately 5 years. For most of that period I have been a student of Florida A.and M. University. I am now in my senior year. I am a Negro.
2. During the period in which I have been a resident of Tallahassee, I have participated in civil rights activities through the Congress of Racial Equality (herinafter referred to as CORE) and through the Florida A.and M. chapter of the N.A.A.C.P. .
3. As a result of my activities, I have been subjected to harrassment and intimidation. On two occasions, I have actually been the victim of unjustified physical attacks by police officers and others,.
4. On one of these occasions, I and four others went by car to "McDonald's", an eating place on West Tennessee Street in the City of Tallahassee. One member of our party, John Parrot, was white. He left the car and ordered hamburgers from a service window. Several white persons began to crowd around him, and strike him. I and the driver of the car then entered "McDonalds" and

tried to peacefully extricate our associate from his difficulties. We then re-entered our car and drove east on Tennessee Street. We were followed immediately by two carloads of people who had attacked our associate, John Parrot. We turned right on to McComb Street and attempted to return to Florida A.and M.. At the corner of Pensacola and McComb Streets we slowed for a traffic light. As we did so, the people in the cars following us proceeded to hurl bottles and automobile jack handles at our car, breaking the windows. Several of them leapt from their cars, which had now stopped for a red light, and continued to break the windows and inflict minor wounds on us. At this point our car stalled and, seeing the hopelessness of our position, I and the driver leapt from the car and attempted to defend ourselves and the car. At this point, the rest of the occupants of the cars which had been chasing us, ran up and continued their assault. There were approximately 14 of them attacking two of us. We quickly got back into our car which rolled down the hill to the vicinity of Railroad Avenue. At that point 2 carloads of police drove up. About 8 police officers jumped out. One of them grabbed me by the collar of my shirt and slammed me against the car. He asked me why I "had assaulted those white boys back there." Meanwhile the other officers were dragging the remaining occupants out of the car. As they did so, they uttered many insults and much vituperations particularly against John Parrot, our white associate, whom they berated for being with "niggers". They asked us to identify ourselves and compelled us to get into police patrol cars. Our repeated inquiries as to whether or not we were under arrest were answered only with racial slurs. After a few minutes during which they drove us toward the jail, they stopped and told us to get out of the cars.

5. The person mentioned above as "the driver" was, on the information and belief , visited repeatedly by police officers who entered his home without permission and without warrants for the purpose of harrassment; he was also often stopped and interrogated on the street. He tells me that because he is now, for special reasons, in a position particularly susceptible to retaliation by police, he is unable to make an affidavit of his own.

6. On the other occasion mentioned in point 3, I had been arrested with approximately 300 others for seeking admission to a motion picture theatre in the City of Tallahassee. We were crowded into small pens in the basement of the city jail and held for several hours without the opportunity to refresh ourselves, or call anyone. One of the girls who was in the same cell as I, fainted and, although we called repeatedly for assistance, none was provided. Because of the desperate situation, we managed to jar the door open and I and three others proceeded to carry the girl who had fainted upstairs. We carried her into a room in which about 25 police officers were standing. When we entered, we asked them to call a doctor. They told us to "get back downstairs." We delayed a moment and asked that a matron be called. In response to this, several of the officers removed their identification plates and started toward us with clubs. We turned to leave, and one of the officers jabbed me in the back with a club and pushed me with such force that I fell down the stairs.

7. On several occasions, while conducting civil rights demonstrations, we were approached by the city attorney, Mr. Hill who berated and threatened us and ordered us to

disperse.

8. For a considerable period of time, I made a practice to attend sessions of the Municipal Court of the City of Tallahassee on Monday mornings. I sat on the left side of the courtroom, supposedly reserved for whites. As soon as the Judge noticed that I was present, he would point to me and ask me whether I had a case before him. I would reply that I didn't but that I merely was interested in observing the proceedings. At that point the Judge inevitably asked me to leave, and when I protested that I should not be excluded from the courtroom, because I had not created the proceedings, he requested that a police officer remove me.

9. The above are only several of the numerous incidents which have occurred in the past two or three years. They indicate the attitude of police and other authorities toward Negroes in general, and toward people active in behalf of civil rights in particular.

10. In my opinion a Negro active in the civil rights movement could not possibly obtain a fair trial in the City of Tallahassee.

Sidney Daniels

Sworn before me
this 15th day of January, 1966.

Arnett C. Greene

Notary Public, State of Florida at Large
My Commission Expires July 29, 1968

ARNETT C. GREENE

APPENDIX "I"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE

-v.-

SPIVER W. GORDON

AFFIDAVIT IN SUPPORT OF MOTION FOR RECALL OF ORDER OF REMAND AND FOR A STAY PENDING APPEAL

Before me, the undersigned authority, a Notary Public for the County of Leon, State of Florida, personally came SPIVER W. GORDON, who, after first being by me duly sworn, deposes and says:

1. I am a Field Secretary for the Congress of Racial Equality, a civil rights organization (herein after refered to as CORE).
2. I am assigned to coordinate the CORE program for equal rights in the State of Florida.
3. I affirm that to the best of my knowledge and belief, that the material allegations contained in the petition for removal are correct. In elaboration of what is stated in the petition, I wish to add the following points:
4. After my arrest, I was taken directly to the jail at City Hall, and I immediately requested the opportunity to make a telephone call. I was told to get into jail, and that I had no right to counsel or anything else until they were ready to permit me to do so. When I complained that my right to counsel was being infringed upon, another police officer told me that, I could "complain to the Justice Department, the F.B.I., Martin Luther King, or anybody" when they let me out. He also said that I had been "getting too much attention in the

newspapers", and that they had "been trying to get" me.

5. Some time later I was taken out of my cell for questioning. I continued to insist that I be allowed to call my attorney and refused to answer questions. The two officers who attempted to question me repeated their previous comments and referred to me contemptuously as "boy", as a "civil righter", and as "sonny".

6. I was then taken downstairs and formally "booked", but I was never told what I was being charged with. I was asked whether "King could raise the money to post bail" for me. After bond was posted and I was released, one of the officers asked me if I wanted a dime to call the F.B.I. now."

7. Approximately ne week later I appeared before Judge Edgar Booth of the Municipal Court of the City of Tallahassee. I was represented by my attorney, Mr. John D. Due,Jr., Esq. Judge Booth repeatedly referred to Mr. Due as "John" or "Due" and to me as "Spiver". On previous occasions I have observed that Negroes are consistently addressed by Judge booth by their first names and as in my case and that of my attorney are insulted by the general lack of respect. This is in contrast to the form of address used by Judge Booth to white persons whom he consistently addresses as "Mr." or"Mrs."

8. On the same occasion when my attorney objected to the charge and the harrassment to which I was being subjected, Judge Booth said that If I wanted to vindicate my federal rights, I had to go to a Federal Court, because he was only there to uphold laws of Florida.

9. I subsequently discovered that the young man,with whom I was talking at the time of the arrest, was a police informer endeavoring to entrap me. On information and

belief he would be paid $10.00 if I am convicted.

10. Through my demonstration and other activities and my public statements, as Field Secretary of CORE, I have become known to officials of the City of Tallahassee including officials and members of the police department well as the city prosecutor and his subordinates as a "civil righter". Because of this, I,and others with whom I have been associated in civil rights activities have been subjected to harrassment and degradation.

11. During January, 1965, my wife, Sadie, and a co-worker, Miss Laura Geison, were canvassing as part of a CORE voter registration campaign. During the campaign they were subjected by officers to derogatory and insulting comments calculated to intimidate them. They were threatened by a police dog carried in the car and by verbal threats of police officers.

12. On numerous other occasions civil rights workers have been threatened, arrested on fictional charges or attacked with tear gas and otherwise subjected to intimidation and harrassment to induce them to cease their efforts on behalf of equal rights for all.

13. The comments of Judge Booth elaborated above are an extension of the pattern established in treating civil rights workers in the Municipal Court of Tallahassee in which civil rights advocates were consistently and continuously referred to as "communist agitators".

Spiver W Gordon

Spiver W. Gordon

Sworn to before me this 14th day of January, 1966.

Arnett C. Greene

Notary Public, State of Florida at Large
My Commission Expires July 29, 1968

ARNETT C. GREENE

APPENDIX "J"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE

-v.-

SPIVER W. GORDON

AFFIDAVIT IN SUPPORT OF MOTION FOR RECALL OF ORDER OF REMAND AND FOR A STAY PENDING APPEAL

Before me, the undersigned authority, a Notary Public for the County of Leon, State of Florida, personally came Sadie Gordon who, after first being by me duly sworn, deposes and says:

1. I am a resident of the City of Tallahassee, Florida and married to Spiver W. Gordon, Field Secretary of the Congress of Racial Equality (hereinafter referred to as CORE) and a member of the Negro Race.
2. Previous to my marriage, I was an employee of CORE, working as a task force worker.
3. On or about the first day of January, 1965, pursuant to a CORE program of voter registration, I was assigned to work in the City of Tallahassee, with Miss Laura Geison, a volunteer worker from Miami, Florida, and a member of the White Race. We were canvassing an area in Tallahassee, described as "French Town", a heavily Negro and nearly slum-type community, seeking to find out who is registered and who is not registered and offering to assist persons who desire to register or who were in need of transportation to register, wherein we would drive such persons to the Court House. While we were canvassing in the "French Town" area from Old Bainbridge Road, going house to house, I noticed that we had attracted the hostile attention of an officer in a police car who kept circling the

block, observing us. Subsequently, when we came off a porch of a house, into the street, the police officer drove up, stopped us, and ordered us to come to him. I saw on his badge that he was Officer McCalphin, City police of Tallahassee. He asked us what we were doing. We answered, "voter registration." He asked us what organization we work were working for. We answered that we worked for CORE. He asked us if any more worked for CORE in Tallahassee. We answered, that there were. He asked us how many, and I said that I didn't know. He then got back into his car and began to follow us, circling the block. His actions effected to harass us and sought to intimidate us, resulting in intimidation of persons we were approaching about voter registration and making us nervous. We then decided to call Spiver Gordon. We went to the corner of McComb and Brevard to use a public phone there, and officer McCalphin drove his car onto the premises of Ashmore Sundry Store, across the street from where we were,the said store being operated by Mr. Ashmore, a white person. The officer went into the store, then got into his car and left. We returned to our canvassing, and in about five minutes, Officer McCalphin returned, this time having in the car with him a vicious German Shepard Dog, which was barking and snapping. He ordered us to come to him and said, "I see you still are canvassing." I said that we were. "How many have you registered?" He asked. I said that I didn't know. The dog seemed quite excited, and the officer then made a move to let the dog out. I touched the officer and begged him not to let the dog out. He scowled and then left. We found a land who needed transportation to the Court

House in order to register. We drove her to the Court House. When I returned to the car with her from the Court House, I saw another city policeman standing there in front of the car. The officer asked for my identification and I showed it to him. He asked how long I had been in Tallahassee. I said that I didn't know. He asked how many we have registered, and I said that I didn't know. He then asked the lady, who just registered, for her identification. She said that she didn't have any. The officer stood for a moment and then left.

Mrs. Sadie E. Gordon
Sadie E. Gordon

Sworn to before me
the 15th day of January, 1966.
Arnett C. Greene

Notary Public, State of Florida at Large
My Commission Expires July 29, 1968

ARNETT C. GREENE

APPENDIX "K"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE

-v.-

SPIVER W. GORDON

AFFIDAVIT IN SUPPORT OF MOTION FOR RECALL OF ORDER OF REMAND AND FOR A STAY PENDING APPEAL

Before me, the undersigned authority, a Notary Public for the County of Leon, State of Florida, personally came Rev. Daniel Speed who, after first being by me duly sworn, deposes and says:

1. I am 59 years of age and have resided in Tallahasse all of my life.
2. I am the President of the Tallahassee Chapter of the National Association for the Advancement of Colored People (hereinafter referred to as the N.A.A.C.P.).
3. I have been a member of the N.A.A.C.P. for approximately 20 years and have been actively engaged in activity on behalf of civil rights. As such, I have myself been the subject of harrassment and intimidation by police authorities, and I have noticed that others engaged in civil rights activities have been frequent victims of harrassment.
4. I believe that a major percentage of the white community still classifies Negroes as inferior and does not believe that Negroes are entitled to equal rights under the law. Many people refer to the civil rights decisions of the Supreme Court of the United States as "that black gown stuff", to which they pay no heed.
5. More particularly, on information and belief, the treatment of Negroes by police is characterized by "pushing

and shoving."

6. On several occasions, I have seen Negroes, picketing on behalf of equal rights, assaulted by white people. Police present on the scene did not attempt to arrest the persons responsible for creating the disorder, but on several occasions, they proceeded to arrest the pickets, although they had remained peaceful throughout.

7. One police officer about whom I have received much information in the form of complaints regarding the unjustified use of force and intimidation against Negroes is Sergeant Peacock. Complaints have come to us on several occasions from people in whose veracity I have cause to to believe, that Sergeant Peacock has stuck and/or pushed Negroes and arrested them without cause or justification.

8. I have been present in the Municipal Court of the City of Tallahassee on several occasions and have noted a great disparity between the treatment of whites and Negroes. On one occasion, I spent the better part of a day in the courtroom of the Hon. Edgar Booth, Judge of the Municipal Court, and noted that he consistently referred to Negroes including older people such as myself, by their first names or, on occasion, as "boy".

9. I have observed that although the courtroom is now "apparently" desegregated, white and Negro prisoners are still kept segregated. The physical arrangement of the courtmoom makes segregation impractical.

10. It is my opinion that Negroes engaged in civil rights activity can not today receive a fair trial in the courts of Tallahassee.

Daniel Speed
Rev. Daniel Speed

Sworn to before me
this 17th day of January, 1966.

Arnett C. Greene
Notary Public, State of Florida at Large
My Commission Expires July 29, 1968

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE
v.

SPIVER W. GORDON

NOTICE OF HEARING

Notice is hereby given that the petitioner, SPIVER W. GORDON will bring his MOTION FOR RECALL OF ORDER OF REMAND AND FOR A STAY PENDING APPEAL, on for hearing before Hon. G. HARROLD CARSWELL, Judge of the United States District Court for the Northern District of Florida, in the United States Post Office and Courthouse, Tallahassee, Florida, on Monday, January 17th, 1966, at 2:00 P.M. in the afternoon or as soon thereafter as counsel can be heard.

Please govern yourself accordingly.

John D. Due, Jr.
Attorney for Petitioner
540½ W. Brevard Street
Tallahassee, Florida

I HEREBY CERTIFY that a copy of the foregoing along with a copy of each and every paper attached hereto, to-wit, a copy of Motion for Recall of Order of Remand and For A Stay Pending Appeal, and Appendices "A" through "K" annexed thereto were served upon the City of Tallahassee by delivering said copies by hand to the office of ROY T. RHODES at 102 So. Monroe Tallahassee, Florida, at A.M. on the 17th day of January, 1966.

Attorney

VERIFICATION

I, John D. Due, Jr., of lawful age, first being duly sworn upon oath, depose and say:

That I am a member of the bar of The State of Florida;

That I am the duly authorized attorney for Petitioner herein, authorized to prepare and verify the annexed petition;

That I have read the annexed petition and know the contents thereof;

That I know of my personal knowledge that all facts stated therein are true except such as are stated on information and belief;

That as to subject matter I believe the petition to be true; and

That I sign this verification on behalf of the Petitioner, because the annexed petition deals chiefly with matters of law and legal inference to be drawn from facts alleged and/or of which I as an attorney have more knowledge than the Petitioner, and for the further reason that time is of the essence.

Sworn to and subscribed to before me
this 17th day of January, 1966./

Notary Public

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the attached PETITION FOR RELIEF IN THE NATURE OF MANDAMUS with verification was served upon the City of Tallahassee by delivery to the office of Roy T. Rhodes, City Attorney, at 102½ South Monroe Street, Tallahassee, Florida, on this 18th day of January, 1966.

John D. Due, Jr.
Attorney

[1966, January 18]

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. ....

SPIVER W. GORDON

-v.-

HONORABLE G. HARROLD CARSWELL

PETITION FOR RELIEF IN THE NATURE OF MANDAMUS

(1) The jurisdiction of this Court is invoked under 28 U.S.C. §§1291, 1651 (1958).

(2) Paragraphs (1) through (11) of the Motion for Stay Pending Appeal filed herewith in the appeal from the United States District Court for the Northern District of Florida, Crim. No. 2732, are incorporated by reference herein and verified by the annexed affidavit of counsel.

WHEREFORE, petitioner respectfully prays:

(A) that a rule to show cause issue pursuant to this Court's Rule 19(2);

(B) that the rule be brought on for hearing after filing of briefs, pursuant to this Court's Rule 19(3);

(C) that upon hearing this Court issue its order, in the nature of mandamus, requiring the Honorable G. Harrold Carswell, Judge of the District Court for the Northern District of Florida:

(1) to vacate his order of December 22nd, 1965, remanding the subject criminal case to the state courts, and

(2) to retain jurisdiction over the cases pursuant to 28 U.S.C. §1443 (1958);

(D) that, pending final disposition by this Court, the Court or a Judge thereof stay the remand order of December

22nd, 1965; and that the Court grant petitioners such other relief from time to time as to it may appear just and proper.

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the attached MOTION FOR STAY PENDING APPEAL and all of the papers and exhibits and appendices attached thereto were served upon the City of Tallahassee by delivery to the office of Roy T. Rhodes, City Attorney, at 102½ South Monroe St., Tallahassee, Florida, on this 18th day of January, 1966.

John D. Due, Jr.
Attorney

[1966, JANUARY 23]

IN THE MUNICIPAL COURT OF
TALLAHASSEE, LEON COUNTY,
FLORIDA

------------------------------------ X

CITY OF TALLAHASSEE

-v.-

SPIVER W. GORDON

Case #:65-3767

------------------------------------ X

MEMORANDUM OF LAW

John D. Due, Jr.
Attorney for Defendant
540½ W. Brevard St.
Tallahassee, Florida

SUMMARY OF ARGUMENT

POINT I

CHAPTER 796.07 (3)(b) IS NOT MEANT TO APPLY TO THE ACT WITH WHICH THE DEFENDANT IS CHARGED.

POINT II

FLORIDA LAW IS UNCLEAR AS TO WHETHER ENTRAPMENT MAY BE RAISED AS A DEFENSE ON A PLEA OF "NOT GUILTY".

Point III

Can words be a crime?

Claim only 1 witness to crime
& it is denied by Δ.

Point IV

"Due process" of
1. R/C 2.

V

Suff. of Evid does not overcome
reas. doubt

VI

POINT I

CHAPTER 796.07 (3)(b) IS NOT MEANT TO APPLY TO THE ACT WITH WHICH THE DEFENDANT IS CHARGED.

Chapter 796 is aptly entitled "Prostitution." The title of F.S. Section 796.07 is briefly given as "Prohibiting prostitution, etc; evidence; penalties." It obviously refers to crimes closely related to prostitution. This must be compared to Chapter 800, entitled "Crime Against Nature; Indecent Exposure." The latter group of crimes comprehends "sodomy," in its broadest sense.

The defendant in the present case is accused of soliciting one Stanley Dillard for the act medically referred to as "fellation". According to Burdick, The Law of Crime, v.3 §878 at P.295,

> "Sodomy is not committed at common law, per os, that is, by means of the mouth, but under statutes, particularly those punishing ... 'the detestable and abominable crime against nature committed with mankind or with beast,' such an act is indictable." See also: Woods v. State, Ala. App. 96, 64 So. 508 (1914); Lason v. State, (two cases), 12 S.2d 305 (Fla.,1943); Ephraim v. State, 82 Fla. 93, 89 So. 344 (1920); Jackson v. State, 84 Fla. 646, 94 So. 505 (1922).

Indeed, all of the Florida cases cited above involve "fellation," and arise under what is now F.S. §800.01. (It would be unthinkable to find such a case under a chapter directed at prostitution, and by the same token one would not expect to find a case involving solicitation for such a purpose under chapter 796. Indeed it is noteworthy that all of the appellate cases which counsel has been able to find under chapter 796 deal, in some way, with "Prostitution". This view is further reinforced by a comparison of F.S. §800.02, ("unnatural and lascivious act") with all of the sections in chapter 796. F.S. §800.02

makes it a crime to commit any "unnatural and lascivious act". It thus catches conduct of the same nature but not of the same extent as that condemned in F.S. §800.01 ("abominable and detestable crime against nature"). This is similar to the manner in which the term "lewdness" is used in F.S. §796.07 to expand the frame of reference of a chapter on "prostitution" to closely related crimes not theretofore encompassed. This is indicated by *People* v. *Bay Side Land Co.*, et.al., 48 Cal. App. 257, 191 P.994 (1920) in which the court interpreted a statute which condemned "lewdness, prostitution and assignatio" as nuisances. The court said:

> "Lewdness is of much broader significance than the other two words ('prostitution' and 'assignation') and includes their meaning as well as all other immoral or degenerate conduct or conversation between persons of *opposite sex*..." (Emphasis supplied).

Finally it should be remembered that:

> "Criminal statutes in derogation of the common law must be strictly construed and if there is any doubt as to their meanin g, the courts should resolve it in favor of the citizen." *State ex.rel. Grady* v. *Coleman*, 133 Fla. 400, 183 So. 25 (1938); *Ex parte Amos*, 93 Fla. 5, 112 So. 289.

Failure to construe F.S. §796.07 (3)(b) in this manner, creates difficulties which should at all cost be avoided. Article 3 §16 of the Constitution of the State of Florida states:

> "Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be amended or revised by reference to its title only; but in such case the act , as revised or section, as amended, shall be re-enacted and published at length."

The purpose and effect of this requirement is to render inoperative any provision contained in the body of an act that is not fairly included in the subject expressed in the title or that is not matter germane to that subject. *Albritton* v. *State*, 82 Fla. 20, 89 So. 360 (1921); *Franzier* v. *State*, 87 Fla. 235, 100 So., 155 (1924; Any act which does not comply with these requirements fails to give the public the notice to which it is entitled and is therefore void.

POINT II
FLORIDA LAW IS UNCLEAR AS TO WHETHER ENTRAPMENT MAY BE RAISED AS A DEFENSE ON A PLEA OF "NOT GUILTY".

It is uncertain whether , in the State of Florida a defendant may declare "I did not commit a crime, but if you believe that I committed a crime, I was entrapped." In certain cases, it is clear that the defense of entrapment is perfectly consistent with a plea of "not guilty". Thus where a defendant claims that he followed a course of conduct and claims that acts as he committed are not sanctioned, he may quite consistently state that he was entrapped into performing those acts which he did perform. In any case, the law as is presently exists in the state declares that a defendant who claimes only that he did not committ a crime could not expect to be found not guilty by reason of entrapment. Neumann v. State, 116 Fla. 98, 156 So. 237.

Defendant submits, however, that the mere claim by the defendant that the police attempted to entrap him is perfectly consistent with a plea of not guilty.

CONCLUSION

Defendant contends that the charges against him should be dismissed, because he did not commit the acts alleged and because the acts alleged do not constitute a violation of the ordinances of the City of Tallahassee.

Respectfully submitted,

John D. Due,Jr.
Attorney for Defendant

[1966, January 2[illegible]]

IN THE MUNICIPAL COURT OF THE
CITY OF TALLAHASSEE, FLORIDA

John Due

CITY OF TALLAHASSEE

vs.

SPIVER W. GORDON

MEMORANDUM TO THE COURT

EDW. J. HILL
Attorney at Law
City Solicitor
Tallahassee, Florida

QUESTION 1.

DOES CHAPTER 796, FLORIDA STATUTES APPLY TO THE PRESENT CASE? DID THE 1965 LEGISLATURE CHANGE CHAPTER 796?

Answering the dual question in inverse order, the 1965 Digests of all Statutory Laws Passed and Constitutional Amendments Adopted, furnished by the Attorney General, shows, on page 126 that there was no change in Chapter 796 made at this session of the legislature.

Answering the preliminary question requires several angular approaches.

(a) It is elementary that Article III, Section 16, of the Constitution of the State of Florida provides, inter alia, that:

> "Each law enacted in the legislature
> shall embrace but one subject and
> matter closely connected therewith---".

The City attaches hereto, as Exhibit 1, pages 47, 48, and of the General Laws of Florida, 1943, Vol. 1. This is the original Chapter 21664, of 1943, codified as Chapter 796, Florida Statutes. A reading of the title to this Chapter (House Bill 238) should make it clear that the law as [illegible] embraced the subject here and matters properly connected therewith. The Act defined lewdness and prohibited [illegible] and made it unlawful to solicit for lewdness. (Sectio of Chapter 21664 defined the term, and the section became Section 796.07(3)(b) Florida Statutes.)

*(b) Lewdness is not confined in its definition in our statute to activity by persons of the opposite sex as may appear in some court decisions; in fact, Commonwealth v. Porter, 237 Mass.1, 129 N.E.298, specifically holds that the term "lewdness" includes prostitution and assignation and other immoral or degenerate conduct between persons of the opposite sex as well as between persons of the same sex, and signifies both illicit sexual intercourse and the irregular indulgence of lust, whether public or private.

(c) We are not here dealing with the commission of the lewd and lascivious act of fellation, which, pursuant to Chapter 800, Florida Statutes, would be a felony. Neither are we dealing with an attempt to commit the act of fellation, which would perhaps require some overt act. We are dealing with the process or activity of solicitation, the request or plea to commit or engage in the specific act. In Pauline v. Lee, 147 So.2d 339, at 362, we find:

> "As to petitioner's first contention, the Court cannot agree. Section 796.07, F.S.A. provides as follows:
>
> '(3) It shall further be unlawful in this state:
>
> (a) to offer to commit, or to commit, or to engage in prostitution, lewdness or assignation'.

Therefore under this section and sub-section, the mere act or process of offering to commit or engage in the proscribed activity is unlawful. No overt act is required to offend this statute. 796.07(3)(b) following logically and alphabetically proscribes the solicitation of another to commit lewdness with himself, lewdness being defined at 796.07(1)(b):

> "The term 'lewdness' shall be construed to include any indecent or obscene act."

Despite some activity extant in this area, it is urged that fellation is still unacceptable to the vast majority of Floridians so as to render it within the realm of indecency and obscenity, and Chapter 796 does apply here.

QUESTION 2.

DOES THE DEFENSE OF ENTRAPMENT CARRY WITH IT AN ADMISSION OF GUILT?

In Sassnett v. State, (Fla.1945) 23 So.2d 618,619, we find these words,

> "---that 'entrapment' presupposes the commission of a crime---"

In this case, on conviction reversed, where defendant was convicted of larceny of a bull, the appellate court raised the point that it would seem [to it] that the defense of entrapment was available to the appellant-defendant, but this was discarded "upon second thought" to be unavailable to the appellant because:

> "---we think appellant was not proved guilty of larceny"

No Florida case appears to be on point here, so resorting to 61 ALR 2d 677, we find the annotation of the subject: "Availability of defense of entrapment where accused denies participating at all in offense" . This annotation leads off as follows:

> "To invoke the defense of entrapment it must necessarily be assumed that the act charged as a public offense was committed, and it has been held, or recognized by strong intimation or necessary inference, in a number of cases, that the defense of entrapment is not available to a defendant who denies that he committed the offense charged."

This ALR annotation refers to the Florida case of Neumann v. State (1934) 116 Fla.98, 156 So.237, as following the above quoted rule. Neumann merely says:

> "---that a charge of entrapment [to the jury] is not authorized where the defendant interposed no such defense, but is specifically contending that he neither committed nor participated in the offense charged."

The City holds that you cannot say you were entrapped into doing a thing that you say you didn't do, and that entrapment presupposes the commission of the offense charged. 9 Fla.Jur. 212, Criminal Law §183, says of entrapment:

> "Obviously,----, if no crime has
> been committed the defense is
> not available." (Emphasis supplied)

QUESTION 3.

WHAT FLORIDA CASES ARE OF RECORD AS TO THIS OFFENSE?

Counsel for the City has found no case specifically dealing with solicitation to commit the lewd act of fellation. In the case most recently read that dealt with 796.07(3)(b), the offense charged was solicitation to result in male and female engagement under the definition set forth in sub-section (1)(a).

Respectfully submitted:

EDW. J. HILL
CITY SOLICITOR
107 Midyette-Moor Building
Tallahassee, Florida

I HEREBY CERTIFY that a copy of the foregoing was served on John D. Due, Jr., 540½ West Brevard Street, Tallahassee, Florida, Attorney for Defendant, this 26th day of January, A.D. 1966.

Edw J. Hill
EDW. J. HILL
CITY SOLICITOR

EXHIBIT 1

Chap. 21663

~~Section 2. That anyone violating this Act shall be deemed guilty~~ of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed Five Hundred Dollars ($500.00), or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment, in the discretion of the Judge.

Section 3. That all other laws or parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.

Section 4. That this Act shall take effect immediately upon its becoming a law.

Approved by the Governor May 1, 1943.

~~Filed in Office Secretary of State May 6, 1943.~~

CHAPTER 21664—(No. 30).

Chap. 21664

HOUSE BILL NO. 238

AN ACT defining and prohibiting lewdness, assignation and prostitution, making it unlawful to engage in, solicit, procure for, aid or abet, lewdness, assignation or prostitution, providing for the admission in evidence of certain testimony in trials hereunder, and providing penalties for the violation of the provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That, as used in this Act, unless the context clearly requires otherwise:

Prostitution, Lewdness, Etc., Defined.

(a) The term "prostitution" shall be construed to include the giving or receiving of the body for sexual intercourse for hire, and shall also be construed to include the giving or receiving of the body for licentious sexual intercourse without hire.

(b) The term "lewdness" shall be construed to include any indecent or obscene act.

(c) The term "assignation" shall be construed to include the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement.

(d) The term "prostitution" as used in Subdivision (a) of this section shall be construed so as to exclude sexual intercourse between a husband and his wife.

Section 2. That from and after the effective date of this Act it shall be unlawful in the State of Florida:

Operation of Place for Purposes of, Unlawful.

(a) To keep, set up, maintain, or operate, any place, structure, building or conveyance for the purpose of lewdness, assignation or prostitution;

(b) To offer, or to offer or agree to secure, another for the purpose of prostitution, or for any other lewd or indecent act;

(c) To receive, or to offer or agree to receive, any person into any place, structure, building or conveyance for the purpose of prostitution, lewdness or assignation, or to permit any person to remain there for such purpose.

(d) To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure or building, or to any other person, with knowledge or reasonable cause to believe that the purpose of such directing, taking or transporting is prostitution, lewdness or assignation.

Engaging in, Unlawful.

Section 3. That it shall further be unlawful in the State of Florida:

(a) To offer to commit, or to commit, or to engage in, prostitution, lewdness or assignation;

(b) To solicit, induce, entice or procure another to commit prostitution, lewdness or assignation with himself or herself;

(c) To reside in, enter, or remain in, any place, structure or building, or to enter or remain in any conveyance, for the purpose of prostitution, lewdness or assignation;

(d) To aid, abet or participate in the doing of any of the acts or things enumerated in Sections 2 and 3 of this Act.

Evidence in Prosecutions for.

Section 4. That in the trial of any persons charged with the violation of any of the provisions of this Act, testimony concerning the reputation of any place, structure, building or conveyance involved in said charge, and of the person or persons who reside in, operate or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge.

Penalty.

Section 5. That any person who shall violate any provision of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than Five Hundred Dollars ($500.00), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment.

Chap. 21664

Section 6. That in the event any section of this Act, or any part thereof, shall hereafter be held to be unconstitutional, the remainder of this Act shall not be affected thereby.

Section 7. That all other laws or parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.

Section 8. That this Act shall take effect immediately upon its becoming a law.

Approved by the Governor May 1, 1943.

Filed in Office Secretary of State May 3, 1943.

Chap. 21665

~~CHAPTER 21665—(No. 31).~~

HOUSE BILL NO. 60

AN ACT to Appropriate $25,000.00 for the Further Expenses of the Work of the Everglades National Park Commission, Created by Act of the Legislatnre Chapter 13887, May 25, 1929, as Amended by Chapter 16966, Acts of 1935.

Be It Enacted by the Legislature of the State of Florida:

Everglades National Park Commission, Appropriation for.

Section 1. For the further purpose of defraying the Expenses of the work of the Everglades National Park Commission, created by Act of the Legislature of May 25, 1929, Chapter 13887, Acts of 1929, as amended by Chapter 16966, Acts of 1935, the sum of $25,000.00 is hereby appropriated for the two-year period from July 1, 1943 to June 30, 1945.

Approval and Payment of Bills.

Section 2. All accounts, claims and bills of any nature against the Everglades National Park Commission shall be examined by the Manager Director of the Commission and if found correct, shall be approved and delivered to the State Comptroller who shall issue a warrant drawn on the State Treasurer against the Everglades National Park Commission's State Appropriation Fund to pay such accounts, claims and bills which have been authorized and approved by the Commission.

Audit of Accounts of Commission.

Section 3. The Governor shall require an audit of the Everglades National Park Commission Accounts, both as they may involve State appropriations and other accounts, to be made at least once during each fiscal year, and the Everglades National Park Commission shall make an annual written report to the ~~Governor as to the Administration of the Commission's accounts.~~

[1966, January 31]

IN THE MUNICIPAL COURT OF
TALLAHASSEE, LEON COUNTY,
FLORIDA

CITY OF TALLAHASSEE

vs

SPIVER W. GORDON

Case No. 65-3767

MOTION FOR A NEW TRIAL

A. The Defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying Defendant's motion for acquittal made at the conclusion of the evidence.
2. The judgment is contrary to the weight of the evidence.
3. The judgment is not supported by substantial evidence.
4. The Court erred in sustaining the objections of the City Solicitor.
5. The Court erred in over-ruling the objections of the Defendant's Attorney.
6. The Court erred in denying Defendant's Attorney to be associated with and by an Attorney who is a member of the New York Bar.
7. The judgment of the Court is contrary to the law.
8. That the Defendant was denied the right to Counsel and therefore the right to a fair trial.
9. Because, as a matter of law, the City of Tallahassee failed to prove beyond a reasonable doubt, the guilt of the Defendant.

10. The Court erred in permitting the City of Tallahassee to offer incompetent, irrelevant, immaterial and illegal evidence and testimony.

11. The Court erred in denying the Defendant's Motion to Quash filed herein and the motion herein is incorporated by reference.

12. The Court erred in denying the Defendant's contentions that the charges against him should be dismissed with reference to the Defendant's Legal Memorandum offered by the Defendant for those grounds stated therein, and the Legal Memorandum and the Court's ruling thereon as shown by the record in this case, are incorporated by reference.

B. The Defendant further moves that hearing on this Motion for a New Trial be set not until after 7 days after the filing of the transcript of the trial or from the time when the testimony taken in the case has been transcribed.

C. Defendant reserves the right to file additional reasons in support of this motion within 4 days from the time when testimony taken in the case has been transcribed.

JOHN D. DUE, JR.
CARL RACHLIN
840½ W. Brevard St.
Tallahassee, Florida

Certificate of Service

I certify that on the 31st day of January, 1966, I served a copy of the foregoing to Attorney Edward J. Hill, City Solicitor, by mailing to the correct address.

IN THE MUNICIPAL COURT OF THE CITY
OF TALLAHASSEE, LEON COUNTY, FLORIDA.

DOCKET NO. 65-3767

- - - - - - - - - - - - - - - - - - - -

CITY OF TALLAHASSEE,)

-vs-)

SPIVER GORDON,)

Defendant.)

- - - - - - - - - - - - - - -

Trial of the above cause before the Honorable Edgar C. Booth, Judge of the above Court, in the Courtroom of the City Hall, Tallahassee, Florida, on January 20, 1966, commencing at 11:00 o'clock a.m.

- - - - -

APPEARANCES:

For the City:

Edw. J. Hill
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MR. DUE: Your Honor, I have with me today Mr. Steve Nagler, an attorney who is visiting me until this weekend. He is a member of the legal Bar. For the purposes of this case, would he be allowed to be here with me?

MR. HILL: I object to it.

THE COURT: Are you a member of the Florida Bar, Mr. Nagler?

MR. NAGLER: No, I'm not, Your Honor, but I am a member of the New York Bar and am allowed to appear before the Supreme Court of the State of New York.

THE COURT: The rules of the Florida Bar Association require that any person who is not a member of the Association cannot represent a person in Florida unless he is a member of the Florida Bar. It would be the same position I would be in if I was in New York, I'm sure. I have nothing against you, there are just rules against people coming down here and establishing residence and going out and taking money from lawyers' mouths here in Florida. I have nothing against you or anything else. I have no objection to him sitting here; that is to say, with you.

MR. DUE: All right.

THE COURT: You can have anybody you want to there at the counsel table with you that you want. He will not be allowed to argue any motions or address himself to the Court. For the purposes of the record, he is not counsel of record in this case and cannot be because it would be against the law and if he was counsel of record then he would be violating the laws of this state. I am sure you are aware of this.

MR. DUE: Yes, Your Honor. I know in some states -

THE COURT: We are in Florida, Mr. Due.

MR. DUE: But I thought there was --

THE COURT: We are in Florida.

MR. DUE: I understand.

THE COURT: And you know, or should know, the law in the State of Florida to be what it is. Unless he has passed the Florida Bar he cannot represent a person in any capacity. He can't draw a Will; he can't even talk to them.

MR. NAGLER: I understand, Your Honor.

THE COURT: Without violating the law. Call your witnesses.

(WITNESSES WERE CALLED AND SWORN. THE RULE WAS INVOKED AND WITNESSES WERE INSTRUCTED ACCORDINGLY.)

MR. DUE: I move that Doctor H. C. Anderson be exempted from the Rule on the grounds that his appearance will be only as a medical doctor, as a medical expert, and I am informed that in ordinary cases such as this that he has been exempted from the Rule.

MR. HILL: Your Honor, I stated to counsel out in the hall that I would exempt him from the Rule, but inasmuch as I see such a vast array of witnesses here who have no knowledge, based on my own personal investigation of this case, of it, I would like to have him remain outside as well.

THE COURT: Well, Doctor Anderson is a physician and as a physician he has a busy schedule to meet and a lot of people he needs to see in the course of the day. Is there any way we can have his testimony taken out of order so that he can be free to go?

MR. DUE: I was going to so move.

MR. HILL: I will stipulate to take his testimony at any time.

THE COURT: All right. Under the circumstances, we are going to take Doctor Anderson's testimony first, if that's all right with him, and after his testimony is completed I would like to have a short conference with both counsel so that we can determine what witnesses are going to be called and for what purpose, sort of a pre-trial conference. I don't expect either side to explore, to exploit, or to give any information except to me so that I will know what these 10, 15, 20 people, what these people are called for, what their purpose is in being here. If there's any way we can shorten the trial and shorten the stay that these people are going to have to be down here, then I'd like to do it. If there isn't any way then, of course, we'll have to go on through it. All right, now, the witnesses will be placed under the operation of the Rule, which means this: During the course of this trial, you will not discuss this case among yourselves nor allow it to be discussed in your presence. This means that you are not to discuss your testimony with anyone else nor are you allowed to discuss anyone else's testimony in front of a third person. This is true both before and after your testimony is taken until this case has been completed. If anyone discusses the case in your presence, please ask them to cease. If they do not cease, then report it to the Court and appropriate action will be taken. When you are called to testify, you will be brought into the courtroom, testify, and then you will leave and remain under the operation of the Rule unless the Court, with the approval of both counsel, exempts you from the Rule or allows you to leave. Are there any questions about the operation of the Rule? (No response). The purpose of the Rule is to assure that the testimony you give is your own testimony and not testimony that you hear here in the courtroom or that someone tells you about after they have testified, or about something that they know about the case. Any questions? (No response). All right, if you will go with the bailiff at this time, he will show you to the witness room where you will remain until such time as you are called as a witness. Doctor Anderson, you may remain as you will be the first witness. I will expect that both counsel will be responsible from this point on in making sure that their witnesses adhere to the requirements of the Rule and anyone in the courtroom at the present time I will assume will not be called as a witness; is that true?

MR. DUE: That's true, Your Honor. That is, except the defendant, Spiver Gordon.

THE COURT: Of course, he's outside the application of the Rule, anyway. We can't go on without him.

MR. DUE: Yes, sir.

THE COURT: The charge against the defendant is solicitation to commit lewdness with himself - I'd better read it the way it is. "Solicit another person to commit lewdness with himself, to-wit, fellacio." As I understand it, this is a violation of a state statute which is adopted by reference as a city ordinance. The offense is/alleged to have occurred on the 21st day of September, 1965, in Tallahassee, Florida. A "not guilty" plea has been entered for the defendant and we are ready to go to trial; is that right?

MR. DUE: Yes.

THE COURT: All right, call Doctor Anderson out of order.

MR. HILL: The City will stipulate that Doctor Anderson, if I am incorrect, sir, please correct me, that you are a medical doctor and you are licensed to practice in Tallahassee, Leon County, and in the State of Florida, and that your specialty is psychiatry; is that correct, sir?

A That is correct.

MR. HILL: I so stipulate that he is qualified under our laws and I assume under the Florida and American Medical Association.

A And the American Psychiatric Association.

MR. HILL: Yes, sir.

DR. H. C. ANDERSON

was called as a witness for the defendant and having been sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q Doctor Anderson, you heard the charge. Can you explain to the Court what soliciting to commit a lascivious, lewd offense is?

MR. HILL: I object to that. That's a legal question and legal terminology and phraseology of an offense committed within the state and that he is not qualified to give any - to answer that question.

THE COURT: The objection will be sustained.

Q Doctor Anderson, can you explain to the Court what a homosexual is?

A A homosexual is defined by the medical and psychiatric profession as an individual who manifests, either consciously or unconsciously, the desire, wish or actively participates in sexual relations with a person of the same sex.

Q Doctor Anderson, you heard the charge against one Spiver Gordon.

A Yes.

Q To-wit, fellatio. In your opinion, can you tell the Court as to whether or not this is an offense by a homosexual, or is a homosexual --

MR. HILL: I object to that.

THE COURT: I'll have to sustain the objection.

Q Would fellatio be something done by a homosexual?

A Homosexuals perform fellatio; yes.

Q Have you examined Spiver Gordon?

A Yes, I have.

Q What are your conclusions after you examined one Spiver Gordon?

MR. HILL: Your Honor, I object to that. There's no proper predicate been laid.

THE COURT: Objection sustained.

Q If fellatio is an act committed by a homosexual, what behavior characteristics must a homosexual have; what behavior disorders?

MR. HILL: Judge, I'm going to object. That's a leading question. In the broadest sense, I don't think that this --

THE COURT: Is this a charge of solicitation or is this a charge of commission?

MR. HILL: It is a charge of soliciting to commit the act of fellatio. Commission of the act is a felony and solicitation is triable in this Court.

THE COURT: I just wanted to check myself. This is a charge of solicitation; you understand that?

MR. DUE: I know that, Your Honor.

THE COURT: All right, proceed.

MR. DUE: Are you overruling, or denying my question here; I don't understand.

THE COURT: What was the question?

REPORTER: "If fellatio is an act committed by a homosexual, what behavior characteristics must a homosexual have; what behavior disorders?"

THE COURT: Can you answer that question?

A Medically I can; yes, sir.

THE COURT: All right, sir; go ahead.

A The medical profession uses the word "homosexual" to designate either a male or a female patient who manifests the signs or symptoms of what we classify under the heading of a character disorder, as opposed to a psycho-neurosis or a psychosis or organic brain disease. If the Court wishes, I can list the signs and symptoms of character disorders, but I think we suffice for purposes of answering the question in that these individuals, who the laymen designate by using this medical phrase "homosexual", in a formal medical examination and evaluation reveal the signs and symptoms, if not all, some or most, attributable to the disease entity or disease classification of character disorders.

Q What are the symptoms or characteristics of behavior disorders?

A Well, as opposed to the mental aberrations or mental signs or symptoms of a person suffering from a psychosis or neurosis, the character disorders, by definition, by medical textbook definition, manifest their symptomathology and pathology by their overt manifest behavior rather than the subjective mental symptomathology they may either demonstrate or report.

Q Doctor Anderson, can you give an opinion as to, medically, as to whether or not one who solicits another to commit a homosexual act would demonstrate these particular behavior disorders?

A It's my medical opinion that an individual who consciously solicits or incites another individual of the same sex to commit what we call a disorder or socially unaccepted form of sexual or deviate behavior, would manifest, upon medical examination and particular psychiatric examination and evaluation, be easily recognized and discernable characteristics and symptoms of a so-called character or behavior disorder.

Q Doctor Anderson, have you examined Spiver Gordon?

A Yes, I have.

Q For what purpose did you examine Spiver Gordon?

A He was examined at your request for the purposes of arriving at a psychiatric definition or report of whether or not he suffered from the character disorder or behavior disorder which manifests itself in a form of socially unacceptable behavior known as homosexuality.

Q Can you tell the Court, or give an opinion or a conclusion, from your examination of one Spiver Gordon?

A Yes; as a result of my examination, psychiatric examination and evaluation of this individual, I fail to find any signs and symptoms and evidence necessary to sustain or warrant the diagnosis of the existence of a character or behavior disorder in this person at this time.

Q In your opinion, would Spiver Gordon be likely to solicit one to commit a homosexual offense, or a homosexual act?

A No.

MR. DUE: Did the reporter get the answer?

REPORTER: Yes, I did.

MR. DUE: That's all.

CROSS EXAMINATION
BY MR. HILL:

Q Doctor Anderson, homosexuality is the deviation between people of the same sex; is that correct?

A I am sure you are implying the deviate behavior?

Q Deviate sexual behavior between people of the same sex is homosexuality in the broad sense; is that correct?

A This is homosexual behavior. This is not the disease homosexuality. It is one of many manifestations of this disease.

Q Right. Now, this fellatio that we're talking about can be committed between males and females, a male and a female, can it not; it is not confined to --

A It's a one-way street. The definition, medically, a fellatio is the opposition of the oral orifice to the male penis. It can be performed by a male, a female or a child, but only on a male.

Q So we're not confined to homosexual activity altogether, then, here? If a person was to solicit or to have the act of fellatio performed on him, it could be performed by either a man or a woman, so we're not wholly confined to homosexuality, or between people of the same sex?

A If we confine our remarks to the information about the two people involved that I have in my possession, we're talking about a homosexual act. If it were to be between one of these two males and another female, it would be a heterosexual act.

Q That's right.

A Whether or not it's acceptable behavior is beyond the --

Q It could still be called fellatio, no matter how it is performed?

A Technically, it is medically identified as fellatio.

Q Now, when did you examine Spiver Gordon?

A The day?

Q When; yes, sir.

A This morning of this day.

Q This morning of this day?

A Yes.

Q Have you examined him previous to this time?

A I have never seen him previous to this time.

Q How long was he examined by you; over what period of time?

A Two and a half hours.

Q This date?

A This date.

Q And you just said you "failed to find"; is that right?

A I didn't say I "failed to find", I said the examination failed to disclose it.

Q Failed to disclose it, that he was likely to commit such an offense?

A No, sir; I said that my examination failed to disclose any evidence, signs or symptoms to warrant or sustain the diagnosis of the existence of this disease in this person on this date.

Q All right, sir; now, when he talked to you, and I'm sure that you did talk to him at length, he knew, at this time that he was, on this date, faced with the offense as charged in this Court; is that correct?

A Uh-huh.

Q Did you know it and did he know it?

A He conveyed and communicated to me that he had this information in his possession.

Q That he was to be charged and tried this date?

A This is what he said; yes, sir.

Q From your own experience, is it not true that a person on first visit with you and just an hour or so before a trial of this kind, would necessarily, shall we say be likely to put his best foot forward and be on his top guard to keep you from finding out or keep from his disclosing anything that would reveal any tendency along these lines?

A No; contrary to popular opinion, and what appears to be your opinion, the psychiatric patient will frequently, unconsciously put his worst foot forward.

Q Did you put him under hypnosis?

A No, sir.

Q Did you give him any of the standard truth serums, injections, that break down his inhibitions and reveal his inner thinking to you?

A I injected no medication that would break down or reveal his thinking to me.

Q You did nothing to him physically, then?

A I consider talking to a person physical.

Q Yes, but you laid no hands on him and gave him no medicines, no pills, no injections, you just merely conversed with him?

A My examination was limited to what I could hear and see.

Q All right. I'm not trying to trap you, Doctor Anderson, I'm merely trying to get to what this is. We're not on a mental spar in here. I'm just trying to get to the --

A I was under the impression that you were about to trap yourself.

Q So one examination just before trial, never having seen this man before, these are the conclusions that you reached?

A Just one conclusion. You keep confusing a conclusion with something you've injected by way of your question. My conclusion is strictly a medical one; particularly, a psychiatric one. That a complete, formal psychiatric evaluation and examination of this man on this day fails completely to reveal any of the signs and symptoms necessary to warrant and sustain the diagnosis of the existence of a disease, to-wit, a character disorder.

Q On this date?

A On this date. If you had 100 psychiatrists here, I feel that they would say he does not have a character disorder on this day and you wouldn't find a psychiatrist to admit that prior to this date he had had one and, as if by magic, this disease disappeared.

Q You did not see him on September 21, 1965?

A I have seen him only on this date.

MR. HILL: That's all.

REDIRECT EXAMINATION
BY MR. DUE:

Q Soliciting a male to commit a lascivious and lewd act, or a lewd and lascivious act, to-wit, fellatio, is this a homosexual act when it is being solicited to commit? I just want to get this straight, for the record.

A Yes; I consider medically and psychiatrically the solicitation of a person of the same sex to commit an act of fellatio to be as much a manifestation and appearance of the disordered behavior or character disorder designated as homosexuality, as the actual commission or submission to such an act.

Q Now, the City, in its cross examination, inquired as to whether or not this was a sufficient examination. Is it necessary for one, a doctor, to give one truth serum in order to reach your conclusion and opinion?

A A person under the transient hypnotic or transient anesthetic effects of the drug sodium amytal, which is being referred to here this morning as the "truth serum", would reveal no subjective or objective evidence that was not disclosed by a formal psychiatric interview on this particular patient. It would offer nothing additional in the way of sustaining or negating the existence of the disease.

Q The examination you gave of one Spiver Gordon, is it a standard procedure in order to reach the conclusion which you reached today?

A It's a standard general outline or form that is used by and taught to psychiatrists, psychoanalysts and psychologists for arriving at a diagnostic evaluation as to the existence of the disease or the nonexistence of the disease in the patient they're examining.

Q So, therefore, it is valid; your examination?

A Yes.

Q Doctor Anderson, is it likely that this one Spiver Gordon suffered these behavior disorders on September the 22nd of 1965; in other words, could he have changed and corrected his disorders now, but it could have been that he had these disorders on the 22nd of September?

A It's extremely unlikely and improbable and I am, without consciously intending to appear arrogant or authoritarian, I think it's unheard of. This type of disorder is notorious for its chronicity and is usually a life-long characteristic.

Q Do you believe that there is any further examination necessary in order to further classify, or clarity Spiver Gordon?

A No; it's my medical opinion, and I'm putting it here on the line, under oath, this morning, that this man does not suffer from what we refer to as this disease called homosexuality, regardless of the names or words you use to designate it. This man, as a result of my medical examination, does not have it.

Q And also extremely unlikely that on September 22nd, 1965, that he had suffered these disorders; is that what you said earlier?

A I am of the opinion that it's as extremely unlikely as it is possible to conjecture that this man suffered from a character disorder, or specifically the character disorder designated medically as homosexually, on September, or in September of this past year.

Q Would it be likely that one Spiver Gordon solicited a male to commit a homosexual act on September the 22nd, 1965?

A Extremely unlikely.

MR. DUE: I have no further questions.

RECROSS EXAMINATION
BY MR. HILL:

Q You don't mean to say that he did not do it, though, do you, Doctor?

A I have no way of knowing whether he did it or whether he didn't. It would be, medically, a deviation from the average type of homosexual/character disorder case presentation.

Q You mentioned the fact that you were under oath here. If a person says, under oath, that he actually did do it, would that bear as much credence as your statement, in your opinion?

THE COURT: I don't think that's a proper question. That is not the issue before this Court. The doctor is here to testify on medical matters only. We are not before a jury and I understand the weight and quality of the evidence being presented. That is not a proper questions.

MR. HILL: No further questions.

MR. DUE: No further questions.

THE COURT: Is there any reason why this witness cannot be excused?

MR. HILL: None on behalf of the City.

MR. DUE: No, sir.

THE COURT: You may be excused, Doctor.

WITNESS: Thank you for your consideration, Judge.

(CONFERENCE FOLLOWED BETWEEN COURT AND COUNSEL.)

MR. DUE: It is agreed with Mr. Ed Hill that the reference and the questions I posed to witnesses regarding September 22nd was an error; that the time is September 21st, 1965.

STANLEY BURL DILLARD

was called as a witness for the City and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. HILL:

Q State your name, please.

A Stanley Burl Dillard.

Q Where do you live, Mr. Dillard?

A Mitchell's Trailer Park, West Call Street.

Q Is that Tallahassee, Leon County, Florida?

A Yes, sir.

Q Where is your home?

A Altha, Florida.

Q Altha, Florida?

A Yes, sir.

Q What is your occupation?

A I'm a student at FSU.

Q At Florida State University?

A Yes, sir.

Q Were you, on September 21, 1965, employed part-time with the City of Tallahassee?

A Yes, sir.

Q Specifically, what officer, if any, were you working with on that occasion?

A Sergeant Marshall Hanes.

Q Did you subsequently work with another officer on this occasion?

A Not directly; Sergeant, now Lieutenant, Burl Peacock was working with us but not at the time the case first came up.

REPORTER: Not at the time what?

A Not at the time the case first came up.

Q On September 21, 1965, in connection with the duties that you just said you were performing part-time, did you see one Spiver Whitney Gordon, the man back there on your left?

A Yes, sir.

THE COURT: Excuse me, would you say your date again?

MR. HILL: September 21, 1965.

Q Would you turn around, Mr. Dillard, and do you recognize that as the man on this case?

A Yes, sir.

Q Will you tell us where you were, within the City of Tallahassee, and what you did and what Spiver Gordon did, please?

A Well, I was at the Northwest corner of Tennessee and Adams Street in front of the Greyhound bus station and Sergeant Hanes was parked across the street diagonally from that corner in the Proctor's Used Car Lot. At approximately 9 p.m. an old man came up to me and wanted to borrow some money.

Q An old man, did you say?

A Yes, sir; and I told him I didn't have any, so he turned and walked off and he talked to Mr. Gordon and this was the first time I noticed Mr. Gordon.

Q Did you know who he was at that time?

A No, sir.

Q Did you know his name?

A No, sir.

Q Had you ever seen him before?

A No, sir.

Q Go ahead.

A So I assumed he probably tried to borrow some money from Mr. Gordon, I don't know; he talked to him for a second and went on. Then Mr. Gordon laughed and walked over to me and said, "That fellow said I looked like Joe Louis." I laughed. Then Mr. Gordon started a general conversation with me and said, "It sure is a dead town, isn't it?" I said, "Yes, I guess so." Then he, "There's not much to do" and I said "No, once in a while you can find something around to do, but it's pretty dead." Then he asked me where I was from and I told him I was a student out at the University. He said he was originally from New York City and didn't know many people around here. Then I said that I was new out at the University and I didn't know many people either. He acted pretty friendly and he asked me would I like to ride around a little bit and I says, "Well, what do you have in mind?" He said, "Just ride around" and then I said, in the form of a question, "Just ride around?" and he says, "Well, what do you want to do?" and I said, "Well, you asked me to ride around with you, so what do you want to do?" He said "A blow job."

Q Do you know what that is and what that is intended to mean?

A Yes, sir.

Q What is that?

A Sucking the male sex organ by the mouth.

Q Is that what you call "a blow job"?

A Yes, sir.

Q And that's the exact words he used?

A Yes, sir.

Q All right; go ahead.

A So to confirm what he said, I said, "What do you mean?" and he said, "I want you to blow me." At that time I stooped down and retied my shoe, which was the signal to Sergeant Hanes and he started across the street. I stood back up and Mr. Gordon asked me had

I ever done it before and I gave him no answer to his question and I said, "I'm kind of fresh" and asked him had he ever done it before and he said, "Yes." Then he laughed and said, "Come on, let's get in the car." Sergeant Hanes had pulled up at the curb by then and we started walking across towards Adams Street from where we were.

Q Who is "we"?

A Mr. Gordon and myself. Sergeant Hanes called to us to stop and walked up and identified himself and showed his badge.

Q Had you seen Sergeant Hanes approaching you in that walking procedure?

A Yes, sir.

Q That you just stated?

A Yes, sir.

Q You knew he was coming?

A Yes, sir, or else I wouldn't have walked away. As I say, he showed his badge and gave proper identification and gave his name and he asked us a few questions about what we were doing and what we were talking about.

Q Was he addressing both of you or just you or just Gordon?

A Well, he was addressing both of us and he asked us for our driver's license and asked us to come down to the station with him and he opened the car door.

the door of the car, and Mr. Gordon got in the front seat and I got in the back seat. As Mr. Hanes was walking around the car to get in on the driver's side, Mr. Gordon turned and said to me, "We're Field Secretaries for C.O.R.E."

Q Would you say that again, I couldn't hear you.

A As Sergeant Hanes was walking around the car to get in the driver's seat, Mr. Gordon turned and said to me, "We're Field Secretaries for C.O.R.E." and I took it that he meant that we were to stick to that story in the event that we were interrogated.

Q Did you - go ahead.

A That's all that was said and I gave him no answer. So from there we went to the police station and there Mr. Gordon was taken in charge by Sergeant Hanes and I was taken upstairs where I gave my statement to Sergeant Hanes after Mr. Peacock came in.

Q Did you ever see Spiver Gordon any more at any time?

A I saw him once later on that night, after all the procedures were over at the police station. Sergeant Hanes and I went back down to the Greyhound bus station to work the same procedure and after we were through there we came back to the police station and I think it was on the way back that I saw Mr. Gordon walking down the street, but I don't believe that he saw me.

Q You had no conversation with him?

A No, sir.

MR. HILL: No further questions.

CROSS EXAMINATION
BY MR. DUE:

Q Mr. Dillard -

A Yes, sir.

Q What was the - you said that you and Spiver Gordon engaged in a "general conversation" and then you said that Spiver Gordon said, "This is sure a dead town." Was there anything else, any other words passed between you and he?

A Not unless it was in the general conversation concerning it being a dead town. I think he said something about, "I don't know many of the places around here where there's a lot of activity going on or anything." As I said before, he said he didn't know many people in town.

Q Were you standing in front of the doors to the Greyhound bus station or were you standing on the, oh, it would be the South side or the Tennessee side of the bus station?

A I was standing probably about 5 to 6 foot from the doors on the Tennessee side.

Q Facing towards the corner? There's a post, you know -

A Yes, sir; well, I was more or less facing at an angle halfway between the corner and straight towards Tennessee Street.

Q Officers Peacock and Hanes were parked in the car across the street?

A No, sir; only Officer Hanes.

Q Just Hanes?

A Yes, sir.

Q Could he observe you?

A Yes, sir.

Q Was he in that parking lot of that - what's the name of the place where he was parked?

A Proctor's Used Car Lot.

Q You say that you are a paid informer?

MR. HILL: He did not say that.

MR. DUE: He did not say that? You will object to that?

MR. HILL: I object to that. It is not proper cross examination. He said nothing about being an informer or being a paid informer.

Q Are you a paid employee of the City?

MR. HILL: I object to that.

THE COURT: Overruled.

Q Are you a paid employee of the City?

A Not now.

Q In September, were you?

A Yes, sir.

Q You were?

A Yes, sir.

Q On what basis were you paid?

A We were paid a flat salary of $5 per night if we made no cases. If we made cases, then it took much more work. We had to go back down to the police station and give statements and put in a lot more time and we were paid $10 a case.

Q Is it true that you are paid $10 for each conviction?

A No, sir; the payment is not contingent upon conviction at all.

Q It has been reported in some of the newspapers -

MR. HILL: Just a minute. I object to getting into what newspapers do and say.

THE COURT: Overruled.

Q It has been reported by certain newspapers in Tallahassee, both the Tallahassee Democrat and the St. Petersburg Times that Chief Stoutamire said that employees such as you are paid $10 per conviction. Are you saying --

MR. HILL: Just a minute before you answer that. Finish your question.

Q Are you saying that he's telling a lie?

MR. HILL: I object to that as being purely hearsay.

THE COURT: That is not proper cross examination. He's not up here to decide whether or not Chief Stoutamire is telling the truth or telling a lie. What Chief Stoutamire said has nothing to do with this case.

MR. DUE: Your Honor, I'm trying to impeach the witness as to his credibility.

THE COURT: I realize that you are, but that's not proper cross examination.

Q Mr. Dillard, how many cases have you been involved in involving your status as a paid employee of the City?

MR. HILL: I object to that as being immaterial.

THE COURT: Overruled.

A I don't know the exact number, but I think around 8. I would have to sit down and think about it for a minute to recall all the cases.

Q How are you paid?

A How am I paid?

Q Yes.

A $10 for making a case and $5 without a case, a night.

Q Are you paid cash or by check?

A Cash.

Q Who pays you?

A It comes from City funds and Sergeant Hanes or Sergeant Peacock pays me.

Q They're the officers that transfer the funds to you?

A Yes.

Q Do you give a receipt for receiving these funds?

MR. HILL: Your Honor, just a minute. I think we're just getting a little far afield again. I do object to any further examination with respect to how this man is paid. He has testified in full and I anticipate what counsel is trying to do. He has associate counsel over there practically running the trial for him which I also object to. I object to any further questioning along this line as to how he was paid, who gives it to him or what funds it comes from or anything like that. All this is intending to explore a newspaper story and it has no place in the trial and is irrelevant.

THE COURT: Well, as far as impeaching the witness is concerned, I think you have gone just about as far as necessary unless you have something specific that you're trying to get to.

MR. DUE: Your Honor, I'm trying to ascertain whether or not he was being paid just for convictions.

MR. HILL: Well, Your Honor, he's answered that.

THE COURT: That has been explained and explored. Also, I would advise associate counsel - not associate counsel, but the other attorney in the case, that we are treading on thin ice and we need to be very careful about what we're doing here today. I'm saying that for your benefit as well as the defendant's. I am not going to permit an unauthorized person to practice law. I think I said before that you can sit up there with him and assist when he asks you a question, but I don't want you running the trial.

MR. NAGLER: May I suggest questions, Your Honor?

THE COURT: No, I don't think so. You're here for the purpose of assisting counsel; that's one thing. But if he is up here assisting you, that's a totally different situation and I don't think that's proper. John Due is a member of the Bar and he's qualified to practice in this Court and there's no reason why he can't handle the defense of this case. All right, go ahead.

BY MR. DUE:

Q How did you become employed with the City?

A Well, when I first moved over here to go to school, I was acquainted with Sergeant Hanes and Sergeant Peacock and I mentioned to them that I would like to have a part-time job to make some extra money. I didn't know anything about this type of work at the time or that it was even carried on. They told me about it and asked me would I like to try it and I said, "Yes, I guess so." We were very carefully coached as to the procedures we could go through and not go through in working this job and we tried it one night and decided to continue it. So this was two or three weeks after we had begun work.

REPORTER: Two or three weeks what?

A After we had begun work.

Q How did you become acquainted with Officers Peacock and Hanes?

A Well, Officer Peacock, I became acquainted with him one day when another boy and I were over here and we came by to see Sergeant Hanes about a place to stay over here when we came to school, to see if he could recommend any place where we might get a room. I've known Sergeant Hanes most of my life; we're from the same county.

Q How many of you were coached or have been coached?

A Oh, I don't know, sir; I don't know how many people have worked as informers for the City.

Q Before you met Spiver Gordon, have you ever been involved in any homosexual activity?

A No, sir.

Q Never?

A Never.

MR. HILL: Now, just a minute. I'm going to move that that be stricken. This witness is not on trial and that is not a proper question on cross examination.

THE COURT: Overruled.

Q Have you ever been arrested before?

A No, sir.

Q Have you seen me before?

A Yes, sir.

MR. HILL: I object to any further questions along that line; whether or not he's seen counsel is entirely immaterial to the issues of this case. He's answered that he's seen him.

MR. DUE: What I'm trying to enter into --

THE COURT: Objection is overruled.

Q When was the first time you saw this counsel?

A Let's see --

THE COURT: Who are you speaking about?

MR. DUE: John Due, myself.

THE COURT: Say "me" then.

A The night of September the 22nd.

Q September -

A The 22nd.

Q Did I try to ask questions?

A Yes, sir.

Q Did I ask you whether or not you remembered seeing this Spiver Gordon on the previous night?

A Yes, sir.

Q Is it true that Officer Hanes drove up in his car and took you?

MR. HILL: Judge, I object again. We are in an entirely different field in cross examination than pertain to the issues here. He's off on another --

MR. DUE: What I'm trying to establish --

MR. HILL: I know what you're trying to do.

THE COURT: Just a minute. Address yourself to the Court.

MR. DUE: This is a person who has been employed as a decoy and that his testimony, which I am later going to move to be stricken on the grounds that it is merely purchased testimony, and therefore invalid.

THE COURT: What does that have to do with the conversation you had with him the day after this thing?

MR. DUE: Your Honor, I'm trying to ascertain the whole pattern in my inquiry of this witness; how I, in a civil manner, tried to investigate this case, to discuss with this witness as to the circumstances of this case and how I have been interferred with by Officer Hanes in order to prevent my inquiry into this case. In order to establish, again, the credibility and noncredibility.

THE COURT: No, that doesn't establish credibility or noncredibility. It may establish hostility or it may establish a lack of cooperation, but in a case where a person is not - the City is not under any obligation to cooperate and a witness is under no responsibility, was never subpoenaed, there was no preliminary hearing requested. None of the other safeguards are insured to a defendant or the fact that a defendant refuses or does not wish to be interrogated by counsel in either a civil or criminal case has no bearing upon the case except to establish hostility and if you did establish hostility, the only thing you've gained is the opportunity to cross examine and you are on cross examination. So for that purpose, the Court sustains the objection to anything further about the failure of cooperation or anything of the City. The City is under no obligation to cooperate in a man's defense. If I'm wrong, you can correct me.

BY MR. DUE:

Q Let's return to September 21st. When you were standing there in front of these doors, in front of the bus station, did you see any other persons other than an old man that you testified to, standing there also?

A At sometime during my conversation with Mr. Gordon, there was a man came out of the bus station and went to the corner and walked across the street. Other than that, I noticed no one else, other than the old man that tried to borrow some money.

Q You did not notice any young girls or women standing or near about the bus station?

A I noticed none; no, sir.

Q Did you see Spiver Gordon come across the street from his car towards the bus station?

A No, sir; the first time I noticed Mr. Gordon was when the old man left me after he tried to borrow some money from me and he walked off a few steps to Mr. Gordon and I turned and he was talking to Mr. Gordon then.

Q And then you say Mr. Gordon approached you?

A Yes, sir.

Q And he said, "This old man said I looked like Joe Louis"?

A Yes, sir.

Q Those were his words?

A Yes, sir.

Q You did not approach Spiver Gordon?

A No, sir.

Q You did not say to Spiver Gordon, "Let us walk towards your car?"

A No, sir.

Q You say that he's the one that invited you?

A Yes, sir.

MR. DUE: That's all I have of this witness.

MR. HILL: Send in Officer Hanes, please.

MARSHALL C. HANES, JR.

was called as a witness for the City and having been sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. HILL:

Q State your full name for the record.

A Marshall C. Hanes, Jr.

Q What is your occupation, Mr. Hanes?

A Sergeant, Tallahassee Police Department Vice Squad.

Q How long have you been an officer with the Tallahassee Police Department?

A Approximately 11 years.

Q So then you were an officer on September 21, 1965; is that right?

A Yes, sir.

Q You saw the young man who just came out of this room, Dillard?

A Yes, sir.

Q Were you with him on September 21, 1965?

A Yes.

Q Were you all working together that night?

A Yes, sir.

Q What are your specific duties with the Tallahassee Police Department, sir?

A We handle homosexuals, gamblers, beer licensed premises, any type of activity that goes under gambling or vice.

Q You are a member of the Vice Squad; right?

A Yes, sir.

Q Did you employ or assist in employing young Dillard, the man who was just here?

A Yes, sir.

Q You were working with him on this night, September 21, 1965?

A Yes, sir.

Q Did all of your activity and all of your work take place within the city limits of Tallahassee, Florida?

A Yes, sir.

Q Specifically where, if you remember?

A The front door of the Greyhound bus station.

Q What did Mr. Dillard do on that occasion; what did you two, together, do; what do you know of your own knowledge?

A I was in Proctor's parking lot. I put him out and sent him across the street to stand in front of the Greyhound bus station and he was standing there. I had give him instructions not to solicit nobody or strike up no conversation with them, to let them do most of the talking. At approximately 9:00 Gordon Spiver - I did not know him at that time -

Q You mean Spiver Gordon?

A Spiver Gordon approached Mr. Dillard at the corner and they carried on a conversation and Mr. Dillard --

MR. DUE: I object. There has been no foundation laid that he was in a position to observe or to see the witness, Dillard, and Spiver Gordon to engage in any conversation.

MR. HILL: If Your Honor please, he's saying he saw them conversing. I don't know what you can object to on that.

THE COURT: I'll overrule the objection.

Q So while you were in the lot across the street, you could see and observe Dillard; is that right?

A That's correct.

Q Did you then see and observe Spiver Gordon?

A Yes, sir.

Q You said you saw them conversing; is that right?

A That's right.

Q You couldn't hear from your position, could you?

A No, sir.

Q Could you see their mouths moving?

A I could see them moving it.

Q But you couldn't hear?

A No, sir.

Q Were you looking at them through field glasses or a telescope or just with your eyes?

A Well, I have eyes and field glasses.

Q Did you use the field glasses?

A Yes, sir.

Q Then what happened?

A They talked there a few minutes and Mr. Dillard reached down and tied his shoe, that was to give me a signal.

Q What was that signal supposed to get you to do?

A I was to come over then and make the arrest. He had solicited to the boy.

Q All right, sir, go ahead. What did you do?

A I proceeded across the street and Mr. Dillard and Spiver was walking off together and I stepped out of the car, pulled my badge and told them "Sergeant Hanes" and they turned around and Spiver says, "Yes, sir, what can I do for you?" and I says, "Sergeant Hanes, of the Tallahassee Police Department, arresting you for investigation" and he says, "Investigation of what" and I says, "Solicitation for lewd and lascivious act." He said, "I don't understand" and I says, "Well, you will when we get up to the station, this is not the place to talk." So I got their identification, their driver's license, and Dillard got in the back seat and Spiver in the front seat.

MR. DUE: Your Honor, I don't understand the purpose of this testimony. I thought the issue was soliciting to commit a lewd and lascivious act not how hewas conducting an arrest and how he performs his duty in making an arrest after the act is accomplished.

THE COURT: Overruled.

Q Go ahead.

A So I proceeded to the station, and I looked at his driver's license and it had "teacher" on it.

Q Who had "teacher"?

A Spiver; it had Gadsden County, Quincy, Florida, and I asked him if he was a school teacher and he said "No" so we proceeded on to the station and I took a statement from Mr. Dillard and then I took Mr. Spiver up and asked him if he wanted to make a statement, that he didn't have to and it was his constitutional rights, advised him of them, and I said, "If you don't want to make a statement, we'll just write it up and get it over with" and he says, "Let 'er go."

Q Did you tell him he could have the advice of a lawyer if he wanted it?

A Yes, sir.

Q Did you allow him to make a phone call or tell him it was available to him?

A Anytime he wanted to.

Q Did he make any phone call at all?

A Not with me. Sergeant Peacock come on up and started the investigation, talking with him, and --

Q My question was: Did he make a phone call?

A No, sir.

Q Not in your presence?

A No, sir.

Q So, therefore, you did advise him of his rights?

A Right.

Q He did not say anything to you because you had advised him?

A Right.

Q You advised him of his right to an attorney?

A Yes, sir.

Q So you did not get any statement from him or anything at all?

A That is correct.

Q He was merely booked and listed on the police docket of the City of Tallahassee?

A Sergeant Peacock took him over and booked him; yes, sir.

Q Did you handcuff Mr. Gordon at any time?

A No, sir.

Q Was he cooperative in every way?

A Yes, sir.

Q Did he appear to be ill?

A No, sir.

Q Did he appear to be drinking?

A No, sir.

Q Then it was just an ordinary arrest on your part?

A That's right.

Q He was not mistreated in any way?

A No, sir.

Q Was he locked up?

MR. DUE: Your Honor --

THE COURT: What's your objection?

MR. DUE: I object on the same grounds - I don't --

THE COURT: Don't lead the witness, Mr. Hill.

Q Was he ever confined to a jail anywhere?

THE COURT: That's leading.

Q After this witness was docketed in your official police records, was he allowed to make bond?

A I was out then.

THE COURT: What's the purpose of this?

MR. HILL: Your Honor, I anticipate many things --

THE COURT: You'll have an opportunity for rebuttal testimony; don't anticipate.

MR. HILL: No further questions.

THE COURT: I mean, you must anticipate but I prefer you don't. Any cross examination?

MR. DUE: Yes, Your Honor.

CROSS EXAMINATION
BY MR. DUE:

Q Mr. Hanes --

THE COURT: Before we get into this cross examination, can I conclude one piece of Court business?

MR. DUE: Yes, sir.

(SHORT RECESS WAS HELD.)

Q Mr. Hanes, how long have you known Mr. Dillard?

A Oh, since, I'd say 1945 when I come out of the Army.

Q How did you get to know him?

A I was raised up at home with him.

Q You're both of the same county?

A Yes.

Q How did you meet him here in Tallahassee?

A Well, he was going to school at Florida State University and we work many of the boys out there and run up with him and asked him if he wanted to work.

Q You asked him whether he wanted to work as what?

A Asked him if he wanted to work with us on the Vice Squad.

Q The Vice Squad?

A Yes.

Q Did you tell him what type of a position he would be having?

A What type of work he'd do?

Q Yes.

A Sure.

Q How many other boys were there?

MR. HILL: I object to that as being immaterial.

THE COURT: Sustained.

Q On this particular night, September 21, 1965, is it true that you were parked in this parking lot somewhat adjacent or across the street from the bus station?

A Proctor's parking lot.

Q Were you parked in the back part?

A No, that particular night I was diagonally. Some nights I'd park on the side, it just depends on where an open spot is in the lot is where you have to park.

Q Therefore, it's true that you could see Spiver Gordon approach the defendant; I mean the witness, Dillard?

A That's right.

Q You saw him approach him?

A Right.

Q Did you see any other person standing around the bus station that day?

A There was another white man.

Q Did you see any women?

A There was no women.

Q About what time of night was this?

A Oh, approximately 9:00.

Q I see. Did you see Spiver Gordon approach the bus station from some direction?

A I saw Spiver Gordon come out of the bus station to the front.

Q Come out of the bus station, you say?

A That's correct.

Q Now, there were three persons standing there, you say; an old man -

A No, I didn't say an old man.

Q You said a white man, you saw another white man; you saw Spiver Gordon and you saw Dillard?

A Right.

Q Could you see as to who spoke to who first?

A This other fellow spoke to Spiver first and then Spiver walked off from him and come over to Mr. Dillard.

Q How many feet was this, do you think?

A Well, I didn't measure it, but --

Q Just a guess.

A Mr. Dillard was standing there at the front door, with me facing the front door it was to the left where that blue strip is up the side and he was standing there and this other fellow was standing near about directly in front of the doors out there in front.

Q From what you were able to see, did you see a violation of the City ordinance?

A From what I saw, I just saw Spiver come up to Dillard and what the conversation was I do not know, and the boy was instructed to give me the signal.

Q Try to answer the question, though, either yes or no. Could you observe or see a violation of the City Ordinances of the City of Tallahassee from where you were situated?

A I could not tell what they was talking about because I did not hear it.

Q So your answer is no, there was no violation of a City ordinance?

MR. HILL: He didn't - I object to that, that's not what he said.

MR. DUE: I ask the Court to instruct the witness to answer the question either yes or no.

MR. HILL: I think he has answered the question.

THE COURT: His answer was that he could not hear what was going on. I don't think he has answered it specifically. Say yes or no to the question. Read back the question, please.

(QUESTION WAS READ BY REPORTER: "Try to answer the question, though, either yes or no. Could you observe or see a violation of the City Ordinances of the City of Tallahassee from where you were situated?"

THE COURT: Yes or no?

A No.

THE COURT: All right; go ahead.

Q I didn't hear your response.

A No.

Q Okay.

MR. HILL: Your Honor, I think counsel here is trying to harrass the witness. He heard that response, in my opinion, and there's no point in making him repeat it over again. He objected and the Court ordered the witness to answer and he did answer it and the machine will record that it heard his answer "No" and the Court then said, "All right; go ahead." I see no point in harrassing the witness.

MR. DUE: Let the record show that my client was conferring with me for a minute and, therefore, I was not harrassing this witness.

THE COURT: Mr. Due, the next time you don't hear an answer or the next time someone doesn't hear the question, the proper way to do it is ask the reporter to read the question or the answer and not get involved in that.

MR. DUE: All right, sir.

Q Officer Hanes --

THE COURT: Just a minute. We'll have a five-minute recess at this time.

(A RECESS WAS HELD.)

BY MR. DUE:

Q Officer Hanes, after you took Mr. Spiver Gordon in custody and returned to the police station, with whom was Mr. Dillard with from then on; in other words, did he go with you along with Spiver Gordon or did he go with another person or officer?

A Up to the police station from the Greyhound?

Q Yes.

A They was together.

Q Went with you?

A That's correct.

Q After you arrived at the police station, where did Mr. Dillard go?

A He was carried up to my office.

Q Along with Mr. Spiver Gordon?

A No; one at a time.

Q Where was Spiver Gordon left?

A He was down in the detention cell.

Q How long was he held in this detention cell?

A I'd say approximately 7 or 8 minutes.

Q What happened after this 8 minutes?

A Then he was took out and carried up to the office.

Q Upstairs?

A Yes.

Q Not by you?

A By me.

Q By you?

A Yes.

Q Did you talk to Spiver Gordon after you took him upstairs?

A Yes.

Q Did you explain to him what this offense was?

A That is correct.

Q You did?

A Yes.

Q What did you say it was?

A I told him soliciting for a lewd and lascivious act.

Q What would that be in layman's terms?

A Well, he solicited to another male for a blow job.

Q Is that what you explained to Spiver Gordon?

A That is correct.

Q Did you explain to him that - did you give him advice as to whether or not he should confess or give information to you?

A I told him that he knew whether he was guilty better than anybody else in the world.

THE COURT: Will you repeat the answer?

(ANSWER READ BY REPORTER.)

THE COURT: Go ahead.

Q That's not responsive to my question. Yes, or no, did you advise him to confess?

A No, sir.

Q You did not?

A No.

Q Did you tell him that Mr. Dillard had given information to you about what transpired?

A I told him Mr. Dillard had made a statement of what went on.

Q Did you tell Mr. Gordon what that statement was?

A I told him he had made a statement that Spiver had solicited to him.

Q And did what?

MR. HILL: Just a minute, Your Honor; I don't understand the question. He answered and then he said, "And did what?"

Q Solicited for what?

A Solicited for a lewd and lascivious act.

Q Did you go into detail as to what Mr. Dillard gave a statement about?

A Not the full details; no.

Q You did not tell Mr. Gordon exactly what soliciting to commit a lewd and lascivious act was?

A I sure did.

Q Did you say that this was what Mr. Dillard said in the statement?

A I said Mr. Dillard said he solicited to him for a lewd and lascivious act; a blow job.

Q Oh; that's what I wanted to ask about. What did Spiver Gordon say in response to that?

A He said, "Let's let it go through Court."

Q You say that you gave him an opportunity to make a phone call?

A To anybody he wanted to.

Q At what time was he released from custody?

A That I could not say. Sergeant Peacock took it over at that time.

Q About what time was this?

A That Sergeant Peacock took over?

Q Yes.

A It was between 9:15 and 9:30; in that area.

MR. DUE: That's all I have of this witness.

THE COURT: Any redirect?

MR. HILL: No redirect at this time, Your Honor. I would like to withhold that because of the fact that the Court has indicated that he wanted to recess anyway.

THE COURT: Do you have any redirect of this witness?

MR. HILL: I might have, but I don't have at this time.

THE COURT: You mean you may have a rebuttal?

MR. HILL: I might have some redirect of this witness.

THE COURT: All right; go ahead.

MR. HILL: I don't have right now. I would like to reserve it if I could.

THE COURT: Are you finished with the witness at this time? I'm just asking, I don't --

MR. HILL: I'm finished with him at this time.

THE COURT: Then there's no further redirect at this time?

MR. HILL: I might like to recall him.

THE COURT: But you have nothing further at this time?

MR. HILL: That's right.

THE COURT: All right; how many more witnesses does the City anticipate?

MR. HILL: The City has one more witness.

THE COURT: Do you anticipate that we could finish with that witness in about 15 or 20 minutes?

MR. HILL: We probably could in the next 15 or 20 minutes, Your Honor, but we're about 9 minutes away from the time you set.

THE COURT: All right. Because of the fact that the normal Court recess would be at 12:00 and the hour is now 12:35, approximately, the Court is going to be in recess from now until 1:30. At that time we will reconvene and continue with this case and we will attempt to complete this case as swiftly as possible. This will be the normal lunch break. Ask the witnesses all to come back in, please.

(WITNESSES WERE BROUGHT INTO THE COURTROOM.)

THE COURT: The Court is going to take normal lunch recess from now until 1:30. As I understand it, all except the three here are witnesses for the defendant. Whether or not you are going to be required to come back or not will be up to the defendant. You should check with him before you leave here for lunch. The case will resume at 1:30; that means that you should be back from whatever personal errands you need to run between now and 1:30, by 1:30. The same instructions that I gave you at the beginning of this case will hold during the time that you're away from the courtroom and that will be that you are now allowed to discuss this case with anyone else or among yourselves. It is not to be discussed in your presence and by that same thing, you are not to read anything about it in the newspapers or listen about it on the radio or anything like that. You're to reserve your own personal information and knowledge and you are not to acquire any between now and then. Is that understood?

(NO RESPONSE.)

THE COURT: The only exception to the fact that you are not to discuss this case with anyone is that you may discuss it with either counsel for the defendant, Counsel Due, or counsel for the City, Ed Hill. Any questions about that?

MR. HILL: Yes, I have a question. The witnesses cannot discuss with counsel together, they must discuss it individually, or is that the ruling of the Court?

THE COURT: If you want to sit down together and talk to the witnesses it's all right with me.

MR. HILL: For instance, if I wanted to have lunch with Mr. Peacock and Mr. Hanes - Mr. Hanes has already testified and it might be improper and I just wanted to get that clear.

THE COURT: You know the rule as well as I do. The rule is the witnesses are not to have the prior testimony or knowledge of what's going on in the courtroom beforehand.

MR. HILL: That's what I wanted to know.

THE COURT: If you discuss Hanes' testimony in front of Peacock, then you would be in violation of the rule.

MR. HILL: The case should not be discussed jointly, then?

THE COURT: No, not to that extent. You can ask them both about what they intend to testify about, yes; that's up to you. You're an officer of the Court the same as John Due and both of you know the operation of the rule. Court will be in recess until 1:30.

(LUNCH RECESS WAS TAKEN. COURT RECONVENED AT 1:30 P.M., AT WHICH TIME THE FOLLOWING PROCEEDINGS WERE HELD:)

BURL PEACOCK

was called as a witness for the City and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. HILL:

Q State your name for the record, please.

A Burl Peacock.

Q What is your occupation, Mr. Peacock?

A I am Lieutenant in charge of vice investigation for the Tallahassee Police Department.

Q Did you have such office or duties connected with that office on September 21, 1965?

A Yes, sir; I did.

Q Do you know the defendant here, Spiver Gordon, the man on your left back there?

A Yes, sir.

Q Did you see him on this night and on this occasion?

A Yes, sir; I did.

Q Would you tell us under what circumstances; what you did?

A I was called by Sergeant Hanes to meet him at the police headquarters and after arriving at police headquarters he was with Spiver Gordon there in my office at the Police Department. There Officer Hanes stated his purpose of having him there and then after talking with Sergeant Hanes, I then talked to a person by the name of Mr. Dillard. In talking with Mr. Dillard, I asked him what happened and he discussed with me his dealings or his conversation with Spiver Gordon.

Q Was this in Gordon's presence?

A No, sir. Then I returned back to the office where Officer Hanes, Sergeant Hanes, and Spiver Gordon was and then I introduced myself to Spiver Gordon, who I had not known before, and I began asking him questions. I advised him that if he wanted an attorney or if he would discuss with me what happened, or what he had been accused of that night. He stated that he wanted to know more about what he was accused of and I began to discuss with Spiver Gordon what he had been accused of.

Q Had you ever told him that he didn't have to talk to you or anything like that?

A Yes, sir; I did, at the very beginning. I asked him if it would be all right if we record the conversation between he and I and he stated that he did not want any recording. So we began talking about what he had been accused of. He said, "Well, I'd rather for you to go ahead and discuss it with me, what I have been accused of; I want to know." I told him that Mr. Dillard had stated that he had walked up to him and began a conversation about some other person stating that he looked like Joe Louis. That's the way the conversation began. Then Spiver Gordon asked him, this Dillard boy, if he would like to go for a ride with him in his automobile. Then he was asked where he wanted to go or why he wanted to go for a ride and Mr. Dillard also stated that he made the remark that the town, it was dead. He then asked Mr. Dillard if he would give him a blow job. I asked him if he denied any of those accusations that had been made against him and he stated, "I go along, I agree with everything with the exception of the blow job." He says, "I remember up to the point of sex and my mind comes blank where you mentioned blow job." And then he said, "I have no more to say" and that he would not discuss it any further and that was the extent of the conversation with him.

Q You did not record this conversation with him?

A No, sir; I did not.

MR. HILL: That's all.

CROSS EXAMINATION
BY MR. DUE:

Q Mr. Peacock, what's your first name?

A Burl; Burl Peacock.

Q How long have you been a police officer in the City of Tallahassee?

A Approximately 10½ years.

Q And what division are you assigned to?

A Vice.

Q Vice?

A Yes.

Q How long have you been assigned to this Vice Squad?

A Approximately 5 years.

Q Have you recently attended an institute in Atlanta, Georgia, regarding homosexual offenses, et cetera?

A Yes.

MR. HILL: I object to any further testimony along this line unless it's reasonably connected with cross examination or that this school was prior to September 21, 1965.

THE COURT: What is the purpose of this?

MR. DUE: What my line of questioning is going to lead into is the practice of using decoys and using Mr. Dillard at the bus station this specific night.

THE COURT: Your objection will be sustained as far as any school is concerned. If you are trying to qualify him as an expert, then the proper way to do that is to call him as your own witness.

Q Is there a particular problem at the bus station which --

MR. HILL: I object to that as being immaterial.

THE COURT: Let him finish his question.

Q Is there a problem of homosexual activities at the bus station within the last several years?

MR. HILL: I object to that as being immaterial.

THE COURT: Sustained.

Q How long have you known the witness, Mr. Dillard?

A I would say approximately one year.

Q How did you meet him, this Mr. Dillard?

A The best of my knowledge, some year ago he was in Tallahassee attempting to locate some place to live while attending the University here in Tallahassee.

Q Did you offer employment with the City of Tallahassee in this type of capacity?

A It was discussed briefly, probably, at that time.

Q A year ago?

A I don't know, probably; it's possible that it was discussed.

Q When did he began to work for you and Mr. Hanes?

A I think maybe some two weeks prior to the 21st of September of '65, to the best of my knowledge.

Q Who pays --

MR. HILL: I object to any further testimony with respect to that.

Q Who pays Mr. Dillard?

MR. HILL: I object as being immaterial.

THE COURT: I'll overrule the objection.

Q Who pays Mr. Dillard?

A The City of Tallahassee.

Q Out of the City treasury?

A Yes.

Q Do you transfer the funds, or do you or Mr. Hanes transfer the funds, to Mr. Dillard?

A Yes.

Q How much is the rate of his compensation?

A $10.00.

Q That's $10 a night or $10 a conviction, or what?

A Well, $10 - it's not based on convictions, it's based on the persons who we apprehend but not on the convictions or what happens afterwards.

Q In other words, if you do not apprehend anyone on a particular night, he doesn't get paid?

A That's not correct; he does get paid.

Q How much is he paid if you do not apprehend anyone?

A Normally, $5 and it's according to the hours or time that we put in, not necessarily the arrest.

Q Say he's there from 8:00 to 10:00, how much is he paid?

A $5.00.

Q Suppose you apprehend one person during this 2-hour period, how much is he paid?

A $10.00.

Q How many other people do you pay on this basis?

MR. HILL: I object to that as being immaterial.

THE COURT: Sustained.

Q Is Mr. Dillard employed at the present time?

MR. HILL: I object to that as being immaterial.

THE COURT: Overruled.

Q Is Mr. Dillard employed at the present time?

A No.

Q For what reason is he no longer employed?

MR. HILL: I object to that as being immaterial.

THE COURT: Sustained.

MR. DUE: Your Honor, the purpose of this question as to why he is no longer employed is, again, going to the credibility of the testimony here and to impeach the testimony of the witness.

THE COURT: Of what witness?

MR. DUE: Mr. Peacock.

THE COURT: You're trying to impeach the testimony of Mr. Peacock by asking him whether somebody else is employed?

MR. DUE: Yes, I want to - yes, I do.

THE COURT: Overruled. I mean, the objection is sustained and, I guess, your proffer is denied.

Q How many persons have you arrested?

MR. HILL: I object to that as being immaterial.

THE COURT: Sustained.

Q How many have you arrested since you arrested Spiver Gordon?

MR. HILL: I object to that as being immaterial.

THE COURT: The objection is sustained. We're dealing with one case; we're not dealing with a series of cases.

MR. DUE: What I'm trying to go into, Your Honor, is whether or not the witness can remember.

THE COURT: We're not here on a question of whether or not the witness can remember what happened on any other case. We're here to test his memory and his ability to testify on this particular case.

Q Officer Peacock, you stand here today and you are stating that you can recall all these events and circumstances of September the 22nd?

A Yes.

Q Despite the fact that you might have appeared in Court and arrested other individuals for this same similar type offense?

A Yes.

Q Have you discussed with Mr. Ed Hill this case?

A Yes.

Q Did you discuss with Mr. Ed Hill about stating that you did not know Spiver Gordon before the arrest?

A When, now, did I discuss that with him?

Q Have you discussed, at any time, with Mr. Ed Hill, your reposed testimony today about whether or not you knew Mr. Spiver Gordon before that day?

MR. HILL: I object to that. I don't know for what purpose these questions are elicited, Your Honor; Mr. Peacock is a police officer and I'm the prosecuting attorney for this municipality and I necessarily, in preparation of this case, have discussed it at length with Mr. Peacock. I don't know where counsel intends to go, but I do object to this line of questioning as being immaterial and can lead us nowhere.

MR. DUE: Your Honor, the witness here opened the door. He testified that he did not know Spiver Gordon before the arrest and I don't know for what reason he would say this.

THE COURT: You may be recalling the testimony different from me, or I may be confused, but I don't recall whether this witness said he knew him before the arrest or not. I recall Officer Hanes saying that, but whether this witness said it or not, I don't recall.

MR. HILL: If Your Honor please, I don't object to him asking Mr. Peacock that direct question, but whether or not he discussed it with me or not is beside the point.

THE COURT: I don't think that's material at all.

MR. DUE: It's material as to whether or not this witness is lying.

THE COURT: Well, now, Mr. Due, let me explain a few things to you. First of all, representations to me that a witness is lying is not the proper way to impeach a witness. Secondly, if you have information or testimony that you want to present that may indicate that he's lying, you may present that testimony. There's no one here to preclude you/from presenting it. The Court will preclude you from getting into matters and issues that are not material in this case. Whether or not Mr.

Peacock had a conversation with Mr. Hill about something pertaining to this case or whether you and the gentleman from New York had a conversation about it is not material to this case until you can show that they are. Your bold-faced assumption and allegation to this Court that somebody is lying certainly doesn't carry any weight with me. I don't know whether you're trying to impress someone or not, but I will suggest to you that you have more of a foundation than that before you make a statement like that.

MR. DUE: Your Honor, the question was whether or not he discussed with Mr. Ed Hill, whether or not he had discussed with him the circumstances as to whether he has met Spiver Gordon before September the 22nd. I think we can go back to the record and I believe Mr. Peacock did say that he had not known Spiver Gordon before September the 22nd.

THE COURT: What's to preclude you from asking that direct question?

MR. DUE: I did and it was objected to before.

THE COURT: Ask the direct question.

Q Have you discussed with --

THE COURT: No, that's not the question. Ask him whether or not he knew Spiver Gordon before.

Q Did you know Spiver Gordon before September the 22nd?

A I did not.

MR. HILL: Can we correct the record again for the date, Your Honor, please?

Q Before September the 21st, 1965, did you know Spiver Gordon before that?

A I did not.

THE COURT: All right; now, what's your question?

Q Is there any particular reason why you say that you did not know Mr. Spiver Gordon before September 21st; did someone suggest to you that you - that we have alleged that you had known Spiver Gordon before September 21st?

MR. HILL: Your Honor, I object again. I don't know where we're going.

THE COURT: All right; answer the question. Objection overruled. Has anyone suggested that to you?

A No, sir.

Q Why did you raise this point in your testimony that you did not know Spiver Gordon before September the 21st, 1965?

A I saw nothing abnormal about me expressing myself when first meeting this subject in my office at the police headquarters.

Q When you discussed with Spiver Gordon at the police station, was this in your office?

A Yes.

Q Did you discuss with him that Mr. Dillard had confessed and that he had given information as to the commission of this offense?

MR. HILL: Just a minute. I don't understand the use of the word "confess" and I object to any form of questioning relative to Mr. Dillard's "connfession." He's not charged with anything and would not have confessed to anything, so I think the form of the question, if Mr. Peacock attempted to answer it, would be misleading on the record.

THE COURT: Mr. Peacock is an officer of some experience and can answer the question as best he can. The question is whether or not he said that. Read back the question.

REPORTER: "Did you discuss with him that Mr. Dillard had confessed and that he had given information as to the commission of this offense?"

THE COURT: Answer the question.

A I did not say it in those words, as far as "confession" and so on. I did ask him if he would like to discuss what he had been accused of, the remarks and statement of Mr. Dillard of he and Spiver Gordon.

Q Did you give advice to Mr. Spiver Gordon as to whether or not he should confess to this accusation?

A I asked him if he would like to discuss it with me, if he did have such problems, if he would like to discuss it with me.

Q Did you give him an opportunity to use a phone before you asked him to discuss this with you?

A No, not the opportunity to use the phone, but he had been advised that he did not have to discuss with me if he did not want to do so.

Q He never told you that he wanted an attorney?

A He stated that he had nothing else to talk about other than, concerning the remarks that had been made against him after listening and verifying them to be true, up to a point, and then he made the remark that he would discuss it further with an attorney.

Q About what time in the evening was this?

A Approximately 9:30.

Q Have you participated in instructing Mr. Dillard on how to work for you?

MR. HILL: I object to that as not being a proper subject of cross examination.

THE COURT: Sustained. You can call the witness back later if you want to make him your witness, for this purpose.

Q You don't know from your own knowledge whether or not Mr. Dillard is lying, do you?

MR. HILL: I object to that.

THE COURT: That is objectionable on several grounds, Mr. Due. One of them is that this witness was not in the courtroom at the time that any other witnesses testified; therefore, he doesn't know what they said. Isn't that right?

MR. DUE: I don't know; that's why I asked the witness the question. He might know what he said.

THE COURT: The objection is sustained.

MR. DUE: That's all I have of this witness.

THE COURT: Any redirect?

REDIRECT EXAMINATION
BY MR. HILL:

Q Do you know, of your own knowledge, whether or not the defendant was advised that he had a right to counsel?

A Yes, sir.

Q Did you do that?

A Yes, sir; I did.

MR. HILL: That's all.

THE COURT: Any recross?

RECROSS EXAMINATION
BY MR. DUE:

Q You advised him when?

A I advised him at the time that I introduced myself to him at the office when first meeting him to talk with him for the purpose of him being there.

Q Did you give him the use of a telephone?

A Yes, he had that use.

Q Did he know this?

A He sure did.

Q You told him this?

A He asked.

Q And did he use it?

A He made, I think, some 4 or 5 telephone calls.

MR. DUE: That's all.

MR. HILL: That's all.

THE COURT: Call your next witness.

MR. HILL: The City rests.

MR. DUE: For the convenience of the witnesses, I will call the character witnesses first.

THE COURT: You may call whatever witnesses you wish to call at this time.

JAMES HUDSON

was called as a witness for the defense and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q Doctor Hudson, state your name.

A James Hudson.

Q Where do you reside?

A 712 Gamble Street, Tallahassee.

Q And where are you employed?

A Florida A & M University.

Q And in what capacity are you employed?

A As Chaplain and as Professor of Philosophy and Religion.

Q Do you know the defendant, Spiver Gordon?

A I do.

Q Could you tell the Court whether his reputation in the community, whether it is good --

MR. HILL: I object as it not being the proper form of question.

THE COURT: Doctor Hudson, do you know whether or not Spiver Gordon has a general reputation within the community?

A As far as I know, he does have.

Q He does have?

A Yes.

THE COURT: Do you know what that reputation is?

A As a respectable citizen.

THE COURT: Any other questions?

MR. DUE: That's all, Your Honor.

MR. HILL: No cross, Your Honor.

THE COURT: Call your next witness.

REVEREND DAN SPEED

was called as a witness for the defendant and having been sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q You are Reverend Dan Speed?

A I am.

Q What's your full name?

A Daniel Boyd Speed.

Q Where are you residing?

A 601 Gore Avenue.

Q What is your business, Reverend Speed?

A I am a minister and I have a grocery business.

Q How long have you been in this business?

A Since the 11th of November, 1936.

Q Reverend Speed, do you know Spiver Gordon?

A I do.

Q Does Spiver Gordon have a general reputation?

A He's known as a gentleman as far as I know, as far as I have been able to ascertain.

Q Can you elaborate on what type of reputation he has?

A Well, I think he's a person that's proven himself as a gentleman for conducting himself respectably among people and as a citizen.

MR. DUE: That's sufficient; that's all, Your Honor.

THE COURT: Any cross?

MR. HILL: No cross.

THE COURT: Call your next witness.

ADDIE FLORA BROWN CRUTCHER

was called as a witness for the defendant and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q State your full name.

A My name is Addie Flora Brown Crutcher.

Q Where are you residing at the present time?

A At the present time I am residing at 1335 Coleman Street, Tallahassee, Florida.

Q Where had you been residing?

A I had resided five months prior to this at 302 South 10th Street, Quincy, Florida.

Q Are you employed - where are you employed, Mrs. Crutcher?

A I am employed at Florida A & M University as a counsellor with the manpower project.

Q How long have you known Spiver Gordon?

A I have known Mr. Gordon since November of '64.

Q Does Mr. Spiver Gordon have a general reputation in the community? Both here and at your past residence in Quincy, Florida?

A Yes, he does have a general reputation of being a gentleman.

Q Explain this reputation or elaborate on it.

A Well, since I have known Mr. Gordon, I have known him as a gentleman; I have known him to be the kind of person who I would trust. He has eaten in my home; we have been out together at various meetings; he has known both me and my husband and he's always portrayed the characteristics of a fine type gentleman.

MR. DUE: That's all.

CROSS EXAMINATION
BY MR. HILL:

Q You don't have any intimate knowledge of his personal life, do you?

A What do you mean by that?

Q Any close association?

A Yes, we've been as close as sister and brother.

Q Would you say that you have a sister and brother relationship?

A Yes, I would say so.

MR. HILL: That's all.

MR. DUE: That's all.

THE COURT: Call your next witness.

REVEREND SYLVESTER STUART

was called as a witness for the defendant and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q State your full name.

A My full name?

Q Yes.

A Sylvester Stuart.

Q Where do you reside?

A Where I reside?

Q Yes.

A In Jefferson County.

Q In what city?

A Monticello.

Q How long have you resided there?

A All my life.

Q What is your profession?

A Minister.

Q How long have you known Mr. Spiver Gordon?

A Better than a year.

Q Does Mr. Spiver Gordon have a general reputation in your community?

A Have a general reputation?

Q Yes.

A Sure, he have a good reputation.

Q Elaborate on how good this reputation is; explain it.

A You say explain it?

Q Yes.

A Well, as I say, I've known him better than a year and I've been with him quite a bit in services and other different organizations, of lodges and what not, and I have never known anything other than of him being a fine Christian gentleman and trying to do all he can to help people.

Q Have you been, let's say, alone with him?

A Been alone with him?

THE COURT: This is the very thing, Mr. Due, that we said we were not going to get involved with.

MR. DUE: I'll strike that question, Your Honor. That's all I have of this witness.

THE COURT: Any cross examination?

MR. HILL: No cross examination.

THE COURT: Witness is excused with the thanks of the Court. Call your next witness.

REVEREND MAJOR JAMES GAFFNEY

was called as a witness for the defendant and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q State your name, please.

A Major James Gaffney.

Q Where do you reside?

A Sir?

Q Where do you live?

A Oh, Jefferson County, Monticello.

Q How long have you lived there?

A All my life.

Q What's your profession, sir?

A Minister.

Q Do you know Spiver Gordon?

A Yes.

Q How long have you known him?

A Approximately, I guess, 12 or 14 months.

Q Does Mr. Spiver Gordon have a general reputation in your community?

A Yes, I should think so.

Q State to the Court what his reputation is.

A As far as I know of him, he seems to be a very fine fellow. His moral condition, he never has had anything against him as far as I know about. I know he has been to visit my church several times where I'm pastoring and he seems to be a very fine man as far as I can see.

MR. DUE: No further questions.

THE COURT: Any cross?

MR. HILL: No.

THE COURT: The witness is excused with the thanks of the Court.

ROSA JACKSON

was called as a witness for the defendant and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q State your full name.

A Rosa Jackson.

Q Where do you live?

A At 724 West Preston Street.

Q Where are you a student?

A At Lincoln High School.

Q How old are you?

A 17.

Q You do understand what telling the truth is and all?

A Yes.

Q On a particular evening, was there an occasion --

THE COURT: What particular evening?

Q In the month of September, was there an occasion where you left the library?

A Yes.

Q Explain to the Court your leaving the library and with whom you left the library with.

A Well, in September my friend and I, whose name is Hazel Davis, was walking down Tennessee Street and a young lady stopped us in front of the bus station and told us that she had been raped and at that particular time we started telling her that the best thing for her to do was to call the police and tell the police about it. At that particular time, a man walked up and he started telling this young lady to call the police also and then after that we left.

Q When was the first time you saw me?

A Yesterday afternoon.

MR. DUE: That's all I have of this witness.

MR. HILL: If Your Honor please, the City moves at this time to strike all testimony of this witness as being totally irrelevant and immaterial and has no relation to the issues before this Court, at this time.

THE COURT I'm not going to strike the testimony but I agree that it has not been shown to have any significance or any materiality. Call your next witness.

MR. DUE: I might recall this witness later on.

MR. HILL: I object to any recall of this witness at this time.

THE COURT: Call your next witness.

MR. DUE: I will call Spiver Gordon.

SPIVER WHITNEY GORDON

was called as a witness in his own behalf and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q State your full name.

A Spiver Whitney Gordon.

Q Where are you livhg at the present time?

A 607 Hampton Avenue.

Q Are you employed?

A Yes, I am.

Q On September the 22nd, 1965, what occurred?

MR. HILL: Your Honor please, pardon the interruption, but we're on September 22 again.

Q On September the 21st, what occurred?

A On September 21st, I had an opportunity to be passing the Greyhound bus station, at which time I saw a lady and two young girls standing in front of the bus station. The lady appeared as if her clothes were torn and she was standing there talking. I saw this and I stopped and I went in and asked the lady what had happened. The lady told me she had been assaulted and raped. I then suggested to the lady that she should report this to the Police Department. She said she was afraid of her life and that the man had warned her if she did he would kill her. I then told the lady who I was and the kind of work I was doing and that I would drive her to the police station. The lady replied that how was she to know that I wouldn't do the same thing. I then pulled out identification and showed the lady who I was and suggested that we go to the police station. She said no, she didn't want to leave, that she didn't want to report it. I said, "Well, stay right here and I'll look around for an officer." I then went to find an officer on foot and I didn't see an officer in sight. I told the lady to wait until I could get in my car and go and look for an officer. At/this time I drove around trying to find an officer in the vicinity. I came back and the lady was gone. I parked my car in the back of the bus station and walked around the side, which is the Adams Street side of the Greyhound bus station, to the front. Standing on the Adams Street corner, a man walked up to me, very loud, and said, "You look just like Joe Louis." I took offense to this and told the man that my name was Spiver Gordon and that all Negroes didn't necessarily look alike. I said it loud enough so that this young man, who was across about from here as I am from the Judge or perhaps closer, who at this time said, "No, you don't look like Joe Louis, what does he mean?" and he engaged me in conversation. He started to say that he was a student at FSU and that he was depressed in the pressure of school activity; that it was causing him great mental frustrations and that he needed to get away from it all and to talk this thing out. At this point, this same old man came back and interrupted the two of us as we were talking. With the distraction caused by the old man, he suggested to me that we would leave the scene and talk. I said, "My car is parked right around here. We can get in it and discuss this." We started to turn and at this point an officer came, whom I later learned to be Officer Hanes. He presented a badge to us and said, "Show me some identification" at which time I pulled out my driver's license and identified myself. He then opened the car door and said, "Get in". I then asked him, "Am I under arrest?" and he said "Get in the car." From prior experience, I know when an officer say that I'm supposed to get in the car. I got into the car and Dillard got into the back seat - both of us got into the back seat of the car. I then inquired again of the officer what was I arrested for. He told me there was a lot of homosexual activity going on at the bus station and that I was being taken in. At this point I requested a phone immediately as soon as I got to the station to call my attorney.

When I got to the station I was put in the cell in the station and Dillard was taken someplace else. I asked Mr. Hanes for a right to counsel and a right to make a telephone call to my wife, who was home, and no one was with her. He told me, "Sonny Boy, you stay there until we come and get you." I stayed in the cell about 15 minutes at which time Mr. Hanes came and brought me upstairs. I asked him what was I doing here and he answered nothing. He didn't say anything. He didn't interrogate me, he didn't ask me any questions at all. Then another gentleman came in who I later learned to be Officer Peacock. He sat down and told me he was a police officer with the Tallahassee Police Department, with the Vice Squad. I told him I would like to get an attorney and I would like to make some phone calls because I had been held over half an hour at that point. He told me, "You'll make your phone calls when we tell you to" and then he went into details. He said, "That boy you were talking with has confessed and he told me that you asked him for a blow job." I told him that I wanted an attorney because I didn't have anything else to say concerning anything that had happened. He said in a pleading tone to me, "Why don't you confess, you know that you are sick and if you confess there's a possibility that we'll let you go to the hospital and let you loose because we have let people loose before who confessed that they had problems; however, if you lie to me we're going to throw the book at you." I told him exactly what was discussed at the bus station and he said, "I don't believe that." And I said, "Well, that's it; I have nothing else further to say until I have the right to an attorney. He said, "Well, there's nothing wrong with getting a blow job, everybody do it, a lot of folk get out and do it, so why don't you go on and tell the truth?" I again told him I had nothing further to say until I had an attorney. I was brought downstairs at this point and I again requested the right to make a phone call. He told me, "You won't make any phone calls until we tell you." He said, "You've been getting too much publicity around here, anyway. Why don't you call King or call the FBI, or the Justice Department, maybe they'll help you. We're going to break up this thing." I said, "All I want to do is make a phone call to my attorney and to my wife." He said, "Well, you won't make any now; you'll cool it in that cell." At this point, he began asking me information and he told me that, at this point, I was charged with whatever this charge is, I can't even pronounce it and he didn't know, either. He never discussed it other than a "blow job" to me. I was in the cell when he told me this. He began typing some papers and I then asked him to make a phone call. He said, "You can make a phone call. Do you want a dime so you can call the Justice Department and the FBI, too?" I told him I wanted to call a bondsman. He said, "Can you make bond of $300 or do you have to get King to make it for you?" I told him I would call an officer, I would call Mr. Hatcher, to come and bond me out, and I made that call. I made another call, I tried to reach Attorney Due, but I couldn't reach him. I was bonded out and I left.

Q Did you see two girls while you were talking to this lady at the bus station whose clothes you said were in disarray?

A I saw two young ladies standing there talking with this lady.

Q How did Dillard appear to you when you talked with him at the bus station, from what he said or how he appeared to you?

A He appeared to be, to me, a person who was highly frustrated and had a lot of problems and wanted to talk to somebody.

Q You said that he appeared to be like a person who had a lot of problems. Can you further elaborate as to his condition?

A Well, he was standing with his head down, kicking and doing like that the whole time he was talking and he was telling me about his problems. I just looked at him because I have seen other people with problems and I took it for granted that he really had problems.

Q Did he appear to be very nervous?

A Yes, very nervous, extremely nervous. He kept looking around and kicking his feet and looking down.

Q When you came back from looking for an officer of the law, did you see these ladies again?

A No, I didn't see the ladies. The only other person I saw immediately was this old, fat man standing on the corner who asked me was I Joe Louis.

Q Did you see the young lady that just testified?

A Yes, I saw her and I remembered her.

Q When you found out you were charged with this offense, did you proceed to look for these witnesses?

A I proceeded - well, I explained to you that there some people there who knew why I was at the bus station and that we could get them for witnesses if I could find them and I explained to you also that I saw they had books in their arms and were of school age and that I would go out and look for them.

Q And how did you find these witnesses?

A I remembered the young lady who was very fair and whose eyes moved quite a bit and I went to the Lincoln High School and asked the principal was there a young lady fitting that description there and he told me there was such a young lady but she was ill. I then left and went to the young lady's house and talked to her at that time.

Q You haven't known this lady before?

A No, I haven't known her before.

MR. DUE: That's all I have of this witness.

THE COURT: Any cross?

CROSS EXAMINATION
BY MR. HILL:

Q How did you say you happened to be at the bus station in the first place?

A I was passing by and I saw this lady and two girls standing there and the lady, her clothes appeared to be torn.

Q Were they on the sidewalk?

A They were standing on the sidewalk in front of the bus station.

Q How close did you walk to them?

A Right up to them, within talking distance, touching distance, of them.

Q Your first testimony was that you were passing the bus station and that would necessarily mean on foot; is that correct, and you walked up to them and talked to them as you have just stated?

A I stated that I was driving in my car; I think I did.

Q You just said that you walked right up to them and I assumed that you were walking.

A Well, I would like to clarify that now. I was passing in my car and I observed this. I got out of my car and I walked up to them.

Q Which way were you going, on which street?

A I was going North on Adams Street.

Q Where were these people on the sidewalk?

A They were directly in front of the bus station, which is on the corner of Tennessee and Adams.

Q And you were going North on Adams Street?

A I was going towards the Mansion.

Q That's North on Adams Street. Are you telling this Court that you were driving North on Adams Street and you observed somebody from across the width of that street at 9:00 at night who was so dishevelled that it caused you to stop your car and go out and interrogate them; is that right?

A No, that's not right. I'm not telling this Court it was 9:00. It was earlier, much earlier.

Q Much earlier?

A Yes.

Q How earlier, please?

A About an hour or so.

Q All right; so, then, all of this testimony that you have given about these girls and things has no relation to something that happened an hour later, about 9:00?

A I haven't said that it was 9:00 when I came back.

Q There has been testimony that you and Dillard had your conversation around 9:00 and you say this was 7:00?

A No, I said 8.

Q So there was an hour's difference between the time you saw this person that you were concerned about and your conversation with Dillard? Is that right?

A No.

Q Well, between 8 and 9 is an hour; is it not?

A Well, it could have been 8:30 when I came back.

Q Then you don't really know; is that right?

A I know it wasn't 9:00 because I went to the station around 9:30.

Q But there was an appreciable period of time; is that correct?

A That's correct.

Q And there was no connection between your being at the bus station at the time you saw Mr. Dillard and the time you stopped to do your deed as a Samaritan to the person whom you thought had been assaulted?

A I came back to see, to check if the lady was still there and to try further and insist that she go to the police. As I explained before, the lady was in fear of her life.

Q I thought she told you that she was afraid of you and that you would probably do the same thing and she didn't want to have anything to do with you?

A Yes, she said that but I also testified that I identified myself, I showed her identification, and told the lady again that I was going to find somebody.

Q Was that supposed to put this person at ease when you identified yourself?

A I think it would have because the lady told me that she was from Chattahoochee and I worked in the Chattahoochee area and my name is pretty well known.

Q Nevertheless, she refused your aid

A She refused to get in the car with me.

Q So you left her?

A I left to find an officer.

Q Where did you go to find an officer?

A I drove around along the block.

Q You have heard the testimony of how well known you are in this community and what a reputation you have; you did not know where the police station was?

A Yes, I knew where the police station was.

Q But you didn't go there for help?

A It was too far. The lady, I thought, would have gone when I would have gotten back.

Q Where did you drive, exactly?

A I drove right around to the corner and looked around and I went completely around the circle there.

Q The block in which the bus station is located; is that what you mean?

A Right.

Q Had she gone by the time you had circled that block?

A I didn't see her; I don't know.

Q Then she was gone.

A She wasn't where I left her. She could have been in the station or somewhere else.

Q Did you go in the station to look for her?

A No, sir.

Q You stopped and talked to Mr. Dillard; is that right?

A Pardon me?

Q You stopped and talked to Mr. Dillard then?

A No, I didn't say that. I said Mr. Dillard stopped and talked to me.

Q You have heard the testimony of all the witnesses here on behalf of the City. Mr. Dillard says he's a student, obtained part-time work working with the City and knew he was going to get paid and yet you're telling this Court that this was a nervous young man with frustrating problems and he wanted to talk things out with you, a total and complete stranger; is that what you're telling this Court?

A That's exactly what I'm telling you.

Q You also heard Mr. Peacock testify that you told him that you agreed with all the things he said Dillard told him up to and including some mention of sex but after you came to this request, the testimony was that your mind went blank from then on; is that incorrect?

A It certainly is incorrect.

Q You used the words a minute ago about exactly what was said in front of the bus station, but that's not what happened; is that right?

A Pardon me?

Q I say you do not agree with what Mr. Peacock said that Dillard told him and what Dillard testified to?

A I don't know what Dillard told him.

Q Mr. Peacock's testimony was that he told you what Dillard said and you agreed with it at that time, but you say now that that is not true?

A That's right.

Q Did you identify yourself to Dillard?

A No, I don't recall identifying myself; there was no need.

Q You identified yourself to this person who appeared to be assaulted and this was going to qualify you to take on her problems, but you didn't give any qualifications to Dillard to assist him in his problems?

A That's right. The reason I stated - the reason I did this, as I stated a moment ago, is that I'm known in the Chattahoochee area and that lady told me she was from Chattahoochee and that lady told me that she was in fear of her life.

Q Do you know what finally happened to that case of the person being assaulted and in fear of her life and raped; do you know what ever happened on that?

A No, I don't.

Q Do you know whether it was ever reported to any law enforcement agency and whether or not any investigation was made?

A I don't know.

Q Did you?

A No, I didn't.

Q Do you talk to strange young men at bus station corners and discuss their problems with them and are willing to drive them away and discuss their problems with them?

A If you were at the bus station and you approached me and appeared as if you had problems, certainly. I'm concerned about humanity.

Q Then all of the testimony here about this man being an employee and an instructed employee of the City on that occasion, that doesn't strike you today as being totally inconsistent with your testimony of a person having problems there on the street on that occasion?

A Anybody who would solicit,or accept money from the City, I have nothing but contempt. I have no real feelings about it.

Q Oh, so that's the basis, now. This is a contempt matter on your part, then; is that right?

A Pardon me?

Q You have contempt for this man?

A I have contempt for anybody who would go out and do that sort of thing.

Q You are contemptuous of him today?

A Pardon me?

Q Are you contemptuous of him today?

A I didn't say that.

Q He testified that he did accept money from the City on these occasions.

A I have had an opportunity to think about this relating to it and I only feel sorry for the young man because he needs help.

Q Did you see Mr. Dillard, or do you remember him stooping down to tie his shoe?

A No, I don't; I remember him kicking his foot and looking down, looking around, acting nervous, but I don't remember him tying his shoe.

MR. HILL: No further questions.

THE COURT: Any further direct?

REDIRECT EXAMINATION
BY MR. DUE:

Q Did you find out the names of these young ladies who you observed at the bus station?

MR. HILL: I object to that as being improper redirect.

THE COURT: Overruled; go ahead.

A Would you please state that question again?

Q Did you further find the names of the young ladies who were at the bus station?

A Yes, I found them by checking at the school.

Q All right; state what their names are.

A I can restate what I said. I remembered one lady whose hair was brown and who was very fair and whose eyes were moving quite a bit. I remembered also that she had books in her arms, both of them had books in their arms, and I assumed that they were coming from the library and I checked at the high school with the principal and he gave me the name of a young lady, whose name is Rosa Jackson and I went on that to talk with Miss Jackson who told me what the other young lady's name was and I later found out that it was Hazel Davis.

MR. DUE: No further questions of this witness.

MR. HILL: No recross.

THE COURT: Call your next witness.

HAZEL LOUISE DAVIS

was called as a witness for the defendant and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q State your full name.

A Hazel Louise Davis.

Q Where do you live?

A 803 West Delaware Street.

Q Is it true that in the month of September there was an occasion for you to be walking home from the library?

A Yes.

Q This was some evening in September?

A Yes.

Q Tell the Court what occurred?

A Well, as I was coming from the library, I was coming West on Tennessee Street and this girl, she was standing on the corner next to a pole and so she stopped us and asked us where was the policeman's station and so we told her where and asked her what had happened and so she told us that someone was trying to rape her or do something to her and so we asked her where she was from and she told us that she was from Chattahoochee. So she dropped the conversation and started talking about something else and after that we left and went on home.

MR. DUE: I have no further questions, Your Honor.

CROSS EXAMINATION
BY MR. HILL:

Q What library are you referring to when you say "the library", please?

A The public library downtown.

Q Downtown?

A Yes.

Q What time of night was it, if you remember?

A That's when I was coming home?

Q Yes, when did you leave the library? Do they close at a certain hour?

A Well, they close at 9, but this was about 8 or 8:30.

Q You don't remember any closer than that?

A That's all I know.

MR. HILL: No further questions.

MR. DUE: No questions.

THE COURT: Call your next witness.

SADIE GORDON

was called as a witness for the defendant and having been sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. DUE:

Q State your full name.

A Mrs. Sadie Gordon.

Q Are you married?

A Yes.

Q To whom are you married?

A Spiver Whitney Gordon.

Q How long have you been married?

A Eleven months.

Q Do you have any children?

A One.

MR. DUE: That's all I have of this witness.

MR. HILL: No questions.

THE COURT: You're excused. Call your next witness.

MARSHALL HANES

was recalled to the stand and having been previously sworn, was examined and testified as follows:

MR. HILL: I assume that counsel is making this officer his witness at this time.

THE COURT: It appears so.

DIRECT EXAMINATION
BY MR. DUE:

Q Mr. Hanes, how is Mr. Dillard paid by the City?

MR. HILL: I object to that as being immaterial and it's also repetitious.

THE COURT: I will have to admit it is somewhat repetitious. I think it's probably material, but I think it's repetitious.

MR. DUE: Your Honor, begging the indulgence of the Court, this line of questioning, I didn't ascertain it on cross, but I think it's still material as far as establishing my point.

THE COURT: Try not to cover ground that's already been covered.

MR. DUE: I'm not going to ask him the same questions that I asked before on cross.

Q How is Mr. Dillard paid?

A He's paid $5 a night to work and if a case is made and he has to stay extra, then he's paid $10 a case.

Q You say if a case is made?

A Yes, if he has to stay overtime.

Q Stay overtime for what?

A To work.

Q At the police station -

A Yes.

Q - or court appearances or what?

A Police station.

Q Police station?

A Yes.

Q In your own knowledge, is this the first time he has appeared in Court?

MR. HILL: I object to that as being immaterial.

THE COURT: Sustained.

Q Is Mr. Dillard employed at the present time?

MR. HILL: I object to that as being immaterial.

THE COURT: Overruled. It has been answered three times. Go ahead and answer the question. Read back the question, please, ma'am.

(QUESTION READ BY REPORTER.)

A No.

Q Why is he no longer employed by the University?

MR. HILL: I object to that. Your Honor has sustained the objection to that question before.

MR. DUE: This is for the record.

THE COURT: I'll sustain the objection and allow you to proffer. Go ahead.

Q Why isn't he employed by you now?

A We're not working now; we work at night. We're in Court.

Q What I mean by that, is he retained, is he still a City employee?

A No, not right at this present.

Q Do you still use him at the bus station?

MR. HILL: I object to that.

THE COURT: All of this is subject to your objection, Mr. Hill. This is for the purpose of proferring into the record.

A We're not working at the bus station now.

Q Since when have you ceased working at the bus station?

A While we're working on other cases.

THE COURT: I think, now, we're getting into an area, Mr. Due, where you are questioning police methods rather than anything pertinent to this case. I think your proffer has gone far enough.

Q Have you filed information or charges against other persons for this same offense since September the 22nd, 1965?

MR. HILL: I object to that.

THE COURT: Sustained.

Q When you were here before, could you tell from where you were parked on that particular evening, September the 21st, who spoke first to whom; did Mr. Dillard speak to Spiver Gordon first or did Spiver Gordon speak to Dillard?

A I could not see which one spoke first, but Spiver walked over to Mr. Dillard.

Q You don't know from your own knowledge whether or not Mr. Dillard is telling the truth or not?

MR. HILL: I object to that.

THE COURT: Sustained.

MR. DUE: I have no further questions of this witness.

MR. HILL: No further questions.

THE COURT: Officer Hanes -

A Yes, sir.

THE COURT: Have you discussed this case with Mr. Dillard since it began?

A You mean since the night -

THE COURT: No, I mean since it began today.

A In Court here?

THE COURT: Yes.

A No, sir; I've been laying out there asleep.

MR. DUE: Can I recross the witness on that point?

THE COURT: Go ahead.

RECROSS EXAMINATION
BY MR. DUE:

Q You said you were lying up here?

A Sitting out there.

Q You didn't eat lunch?

A Sure.

MR. HILL: Judge, we're getting into frivolous testimony now.

THE COURT: I agree.

MR. DUE: That's all.

THE COURT: Call your next witness.

MR. DUE: Your Honor, I have no further witnesses.

THE COURT: What do you do?

MR. DUE: I move --

THE COURT: Do you rest?

MR. DUE: Yes, I rest and I move to direct a verdict to acquit Mr. Spiver Gordon on the grounds that there was insufficient evidence produced here today to show that beyond a reasonable doubt that Spiver Gordon did commit this offense of soliciting to commit a lewd and lascivious offense, to-wit, fellatio.

THE COURT: Motion will be denied. Do you have any supporting authorities or anything you want to present?

MR. DUE: No, I have nothing further.

THE COURT: Motion will be denied. Do you have any rebuttal?

MR. HILL: No rebuttal.

THE COURT: All right; how long do you all want to sum up?

MR. HILL: I'll waive opening argument.

THE COURT: You do and you don't have a rebuttal.

MR. HILL: Is it necessary that we argue this afternoon?

THE COURT: I'm going to rule this afternoon.

MR. HILL: Your Honor, the City's case is specifically on the record. The City has proved, through competent witnesses, jurisdiction, venue and every element of this case to what the City feels is to the exclusion of every reasonable doubt. Necessarily, there is a conflict in the testimony and that conflict is primarily raised by a plea of not guilty. But these officers who testify are qualified police officers, both of them of many years standing, and know what their job is.

THE COURT: What is the statute that you're proceeding under? I'm interested more in an argument on the law than on the facts of the case. I don't mean to cut you off. Do either of you have case authorities?

MR. DUE: The cases which I would cite are Weathers vs. United States, a Florida case, which is 126 F2d 118, certiorari denied, 16 US 687, 1942 case; and another case is Peters vs. Brown 55 So2d 334, Florida, 1952.

THE COURT: Do you have your statute?

MR. HILL: The statute is 796.07(3)(b), which says: "It shall further be unlawful in the State to solicit, induce, entice or procure another to commit prostitution, lewdness or assignation with himself or herself."

THE COURT: Off the record.

(COURT STUDIED STATUTE.)

THE COURT: All right. Do you have anything further, Mr. Hill?

MR. HILL: No, Your Honor; you said you were interested only in the law and we submit that we have proved the case to the exclusion of any reasonable doubt.

THE COURT: You stated the law under Chapter 796, which is prostitution. Is there anything else about the crime against nature, or is that a felony?

MR. HILL: That is a felony; yes, sir. The commission of what is solicited here today is a felony, the actual commission of it, but solicitation to commit this lewd and lascivious act, to-wit, fellatio, is a misdemeanor.

THE COURT: This is the statute that you are prosecuting under at this time?

MR. HILL: Yes, sir; it's adopted by the City as an ordinance.

THE COURT: Mr. Due?

MR. DUE: Your Honor, we have had this case before us before on occasions, such as a motion to quash, and

I don't want to repeat myself again for your indulgence. May I proceed to point out certain things that the evidence has shown today?

THE COURT: You may make any arguments that you wish at this time.

MR. DUE: There has been no witness to corroborate the testimony of Mr. Dillard, which witnesses on behalf of the City admitted and which it is clear from the testimony that this only the words coming from Mr. Dillard's own mouth. Secondly, Doctor H. C. Anderson testified - it's true where there might be a conflict between experienced city employees, such as Mr. Dillard, and a defendant, one must weigh the experience of the accuser. But in this case, we were fortunate to have testify before the Court Doctor H. C. Anderson, who testified that it is extremely unlikely for Spiver Gordon to have committed this offense because to have committed this offense he would have to demonstrate certain behavior disorders which, in his examination, were not present. Also, I wish to suggest to the Court that this type of offense may/be against nature and abominable, but there's Florida cases showing that the City or the State cannot employ decoys to ensnare innocent, law-abiding persons into commission of these offenses and --

THE COURT: Now, before we get any further, what you're talking about now is entrapment.

MR. DUE: Yes, sir.

THE COURT: As I understand the law of entrapment, if you plead the defense of entrapment, you admit the offense; is that correct?

MR. DUE: I believe Florida law follows the inconsistent defense rule. I am saying that, one, Spiver Gordon did not commit the act and, number two, even if he did commit the act, it was entrapment. Of course, I don't have a case ready -

THE COURT: I don't want to cut you off on any defense you feel that you have available to you; however, I do want to caution you before you go forward with the defense of entrapment, that you're sure you know what you're doing.

MR. DUE: Your Honor, as I argued before on the motion to quash, this was an attempted entrapment and, of course, the motion to quash was denied. Nevertheless, I was requesting the Court to consider the fact that decoys are used in the City, by the City, to, apparently, to, as I argued, to ensnare innocent people.

THE COURT: What do you base that point upon?

MR. DUE: I wish you would take judicial notice, I don't know if you can, but there have been many charges brought against persons for this offense and because of being embarrassed have never appeared in

Court for their own protection.

THE COURT: A lot of people are charged in this Court with traffic offenses, but it doesn't necessarily mean that the police officers are out on the street trying to ensnare people into traffic violations. I don't see that it follows, if you would have people - I would admit that because of this type of offense, many people do not wish to appear in Court; however, the fact that they forfeit bond does not necessarily mean one thing or the other. It doesn't mean anything. It means that they pledged a bond with the City insuring that they would appear at the time and place set for trial and that they did not appear and the City forfeited the bond. Technically, they're fugitives.

MR. DUE: Your Honor, what I'm trying to argue is that although a person may, because of convenience, forfeit a bond, this is a very detestable offense which Spiver Gordon is accused of and I am suggesting that many persons in this City have been accused of this thing. It's not the same; therefore, you must weigh very carefully all evidence regarding this offense because, otherwise, this can lead, or allow an opportunity for misuse of the ordinances of the City of Tallahassee in order to persecute a person.

THE COURT: Instead of parading horror, Mr. Due, let's try to stick to the case.

MR. DUE: That's all I wish to say, Your Honor.

THE COURT: That's all you wish to say?

MR. DUE: Yes, sir.

THE COURT: You're up here today defending a man for this kind of offense and that's all you have to say? You don't have any case law or wish to argue any law at all?

MR. DUE: I think the facts speak for themselves, Your Honor, and I presented --

THE COURT: The facts don't speak well enough to me. This is an offense which is either committed or not committed and it is an extremely technical offense. There are questions of law that should have been explored and at this time argued. You haven't argued anything except that it's a crying shame that people ought to forfeit bonds in the City of Tallahassee and refuse to defend this type of offense. It's the same thing that's been said in the newspaper in Letters to the Editor and things like that. It's nothing new; it's nothing legal; it has no force or binding effect upon this Court whatsoever. It is not anything that a lawyer should present for his client. What are you presenting in favor of your client as far as the law is concerned? Have you researched the points of law?

MR. DUE: Yes, Your Honor; I have attempted to research the defense of entrapment but because certain questions which I wanted to ask to determine whether or not there was entrapment, the questions were, of course, objected to and I wasn't able to proceed along this line.

THE COURT: I do not wish to cut you off on any defense that you might have. I did not cut you off on any testimony that might have dealt with entrapment. If you want to present any authorities to the Court concerning entrapment, I'm asking, in fact I am requesting, that you do so at this time, which is your function as an attorney.

MR. DUE: Your Honor, I would appreciate an opportunity, therefore, to give you a brief of law or a legal memorandum.

THE COURT: Today is the day that legal memoranda should be prepared. That's what I'm saying. This thing has been set since late September and has been postponed on at least three occasions. On one of those occasions you didn't even get in touch with the Court before you postponed it on your own. Because of peculiar circumstances involved at that time, no mention of it has been made before, but it's being mentioned now. You have had ample and, indeed, you have had adequate opportunity to present to this Court anything you want to. You have had a series of months to get yourself prepared for this case. There's no excuse for your not being ready today. There are several things bothering me so far as the law is concerned in this case and I will give the defendant until Monday and I will give the City until Thursday to reply on these specific questions. First of all, whether or not Chapter 796 applies to this case, that's Florida Statutes 1965. Secondly, what is the state of the law, whether or not 1965 legislature made any changes in the statute. That's 1 and 1A. Secondly, whether or not the defense of entrapment carries with it an admission of guilt. Third, whether or not/there are any cases in this State dealing specifically with the offense of solicitation to indulge in a lewd and lascivious act.

MR. DUE: Repeat No. 3, Your Honor.

THE COURT: Whether or not there are any authorities, cases, in this State dealing with the offense which we are faced with today. I don't want some rambling platitudes on circumstances and I don't care to hear anything about the general, all the lands of the Supreme Court of the United States, unless it specifically deals with this offense. We're dealing with an extremely narrow statutory interpretation and if you have some law on the case I will be glad to consider it. The only reason I'm giving you this extra time is in order to insure that you had every opportunity to present anything you want to to this Court. You have had more than ample opportunity to do it before and it should have been done before, but because of the fact that this is not a thing so familiar to me, either, I'm going to ask for help on the case. The City may respond or it may decline to respond, as it wishes, but I'm going to give you the opportunity to present any law that you want to on your defenses and I don't want any excuses on why you didn't have enough time or anything else; is that clear?

MR. DUE: That's understood, Your Honor.

THE COURT: This case will be - now, the memoranda should be presented to me and at that time I will go ahead and decide the case based on the arguments received today and the memoranda. There will be no further oral arguments on the case unless it is specifically requested and at this time I doubt that I would be inclined to grant any further oral arguments. I will decide the case from the briefs probably sometime next week. Does the City have any objection to this procedure?

MR. HILL: Your Honor, I would only like to request that the City be served with a copy of the memorandum at the same time it's presented to the Court.

MR. DUE: I will do that.

THE COURT: And if you present any, you will serve a copy on him.

MR. HILL: That's correct.

THE COURT: All right; call your next case.

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(THE FOLLOWING PROCEEDINGS WERE HELD AT THE SENTENCING OF THE DEFENDANT HEREIN, HELD IN THE COURTROOM AT THE CITY HALL, TALLAHASSEE, FLORIDA, ON THE 27TH DAY OF JANUARY, A.D., 1966.)

THE COURT: I have reviewed the memoranda filed by the defendant and the City. Do either the City or the defendant have anything further they would like to present?

MR. HILL: Is this in the nature of oral argument on the merits or anything further to present?

THE COURT: On either.

MR. HILL: No, sir; I think we have already had whatever argument is necessary for the City.

MR. DUE: I have nothing further to argue, Your Honor.

THE COURT: Spiver Whitney Gordon, based on the testimony presented to this Court and based upon my review of the law presented by the defendant and by the City, I find you guilty of the offense. Is there anything you or your attorney wish to say before the sentence is imposed?

MR. DUE: Please the Court, may I approach the Bench, off the record?

THE COURT: You may go off the record.

(DISCUSSION OFF THE RECORD.)

THE COURT: Is there anything you or your client wish to say before the sentence is imposed?

MR. DUE: No, not at this time.

THE COURT: Anything you wish to say?

THE DEFENDANT: No, sir.

THE COURT: It is the judgment of this Court that you be fined $200 or 60 days in jail; however, the Court will suspend $150 of the fine and place you under probation for 60 days on the condition that you abide by all municipal ordinances and the laws of the State of Florida. So long as you conduct yourself so as not to be brought back before this Court for anything further within 60 days, then $150 of the fine will be suspended. If you are brought back for any breach of any municipal ordinance or any state statute within the province of this Court, this case will be reopened, you will be charged with violation of probation and the fine of $150 which has been suspended will be imposed upon you. That means that the remainder of the fine, which is $50, will have to be paid. Is there anything further?

MR. DUE: I believe the statute regarding appeals of the Municipal Court require it to be filed within 30 days and Mrs. Causseaux is very busy with other matters; therefore, I was wondering whether or not you can give me the full allotment of time to file a motion for new trial.

THE COURT: As I understand the law, your motion - the time of filing cannot be extended. I think this is a jurisdictional requirement, but I may be wrong.

MR. HILL: You cannot waive jurisdictional requirement for filing appeal in the --

THE COURT: Not the appeal.

MR. HILL: Motion for new trial.

THE COURT: Well, I cannot extend the time for filing motion for new trial nor notice of appeal.

MR. DUE: I believe the motion for new trial must be filed within 4 days.

THE COURT: Where did you read that?

MR. DUE: The Florida Statutes, I believe, and/or within 15 days if for good cause shown.

THE COURT: Mr. Due, you are an attorney and the Statutes are available and whatever the statutory period of time is, that is the period of time you have. It is my understanding that the Court does not have the right or the jurisdiction to extend the time for filing a motion for new trial. If you can show me you do have a reason for asking for an extension of time, I will be glad to consider it.

MR. DUE: I will file a motion for new trial later.

- - - - -

FLORIDA)
:
COUNTY OF LEON)

I, CAROL C. CAUSSEAUX, C.S.R, Official Court Reporter for the Second Judicial Circuit of Florida and Notary Public, State of Florida, At Large, do hereby certify that I reported the foregoing proceedings in shorthand and by Audograph recording at the time and place and in the cause indicated in the caption; that I later reduced the same to typewriting and that the preceding pages 1 through 113, inclusive, constitute a true and accurate transcription of my notes and records of said proceedings held.

WITNESS my hand and official seal at Tallahassee, Leon County, Florida , this 14th day of February, A.D., 1966.

Carol C. Causseaux

CAROL C. CAUSSEAUX, CSR
P. O. BOX 1028
TALLAHASSEE, FLORIDA

Notary Public, State of Florida at Large
My Commission Expires Dec. 3, 1966
Bonded By American Fire & Casualty Co.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Tal. Crim. No. 2732

CITY OF TALLAHASSEE

-v.-

SPIVER W. GORDON

MOTION FOR RECALL OF ORDER OF REMAND AND FOR A STAY PENDING APPEAL

1. On October 8,1965, a petition was filed in this, the United States District Court for the Northern District of Florida, seeking to remove a city offense prosecution, pending in the Municipal Court of the City of Tallahassee, Florida, against Spiver W. Gordon arising from his arrest on September 27,1965 on the charge of "solicit (sic.) for lewd and lascivious act, to-wit, fellation." The jurisdiction of the District Court was invoked under 28 U.S.C. §1443 (1) and (2) (1958).
2. Acopy of the removal petition is annexed hereto as Appendix "A", and allegations of the petition are hereby incorporated by reference.
3. On November 19th, 1965, a petition to remand was filed in this Court by the Attorney for the City of Tallahassee. A copy of said petition to remand is annexed hereto as Appendix "B". The petition to remand did not contest the factual allegations of the removal petition but merely questioned the legal sufficiency of the petition.
4. Argument on the motion for remand was set for December 22nd, 1965, and counsel for petitioner submitted a memorandum of law in opposition to the motion to remand annexed hereto as Appendix "C". This District Court, Hon. G. Harrold Carswell, Judge, presiding, called, over the objections of petitioner, for evidence on the

truth of the allegations set forth in the removal petition, but did not hear arguments on the legal sufficiency of the petition. The Court refused to grant a continuance to allow petitioner to present evidence in support of the allegations in his petition for removal.

5. On December 23rd, 1965, the Hon. G. Harrold Carswell ordered the case remanded to the Municipal Court for the City of Tallahassee. A copy of the order is appended as Appendix "D". Notice of appeal was filed in the District Court on December 29, 1965. A copy of said Notice is annexed hereto as Appendix "E".

6. As stated previously in point (3), the motion to remand raised no issues of fact and hence, an evidentiary hearing was uncalled for. Even had such a hearing been justified, counsel for petitioner had no notice thereof. Rather, he was led to expect only an argument on the question of whether or not the petition for removal stated adequate grounds for removal as a matter of law. (see Appendix"F") Considering the nature of the motion to remand and the issues raised thereby, the factual allegations of the removal petition should have been taken as true.

7. Had the motion to remand controverted the factual allegations of the removal petition thus creating an issue for an evidentiary hearing, and had the petitioner been duly notified that such a hearing was to be held, and had he been granted adequate opportunity to present had he been granted adequate opportunity to present evidence supporting the allegations of the removal petition, the petitioner would have presented inter alia evidence as appears in the affidavits appended as Appendices "F" through "K" showing:

   (a) That due to the hostility of the Municipal Court to people active in the civil rights movement, petitioner would have been unable to raise objections to denials of his federal rights.

(b) That the prosecution of the petitioner was part of a continuous pattern of official hostility designed to harrass and intimidate people active in the civil rights movement from pursuing equal protection of the laws.

(c) That the charges against the petitioner was an unconstitutional application of the statute.

all of which are alleged in the petition for removal and any of which constitute adequate grounds for removal as a matter of law, since they show a "... planned prosecutional abuse of a (state criminal) statute." Dombrowski v. Pfister, 380 U.S. 479, 85S.Ct. 1116, 14L.Ed.2d 22 (1965); Cox v. State of Louisiana, 348 F2d 750 (5th Cir. 1965).

8. Thus, unless the order of remand is recalled and is stayed forthwith, petitioner will suffer an irreparable injury. The pending criminal charge is now set for trial in the Municipal Court of the City of Tallahassee on January 20, 1966. Prosecution in the Municipal Court serves no legitimate State or City concern if the removal is proper. It does - (a) take petitioner to trial, in a forum in which Congress has directed that he not be tried, and in which he cannot effectively enforce his federal constitutional and statutory rights, (b) subject him to the restraints of the state criminal process during the very period, when his right to federal removal is being tested, (c) potentially moot the question of the propriety of the removal, and, (d) thus punish him for excercising, and inhibit the excercise in the future, of his 1st and 14th Amendment freedoms, and those of his associates.

9. Stays pending appeal of remand orders in similar cases have recently been issued in Baines v. Danville, 321 Fed. 2nd 643 (4th Cir. 1963), Rachael v. Georgia, 342

F2d.336 (5th Cir.,1965); *Georgia* v. *Tuttle*, 32 U.S.L. Week 3446 (decided June 22, 1964); and in *Cox* v. *Louisiana*, 348 F2d. 750 (5th Cir., 1965); the Supreme Court sustaining the Court of Appeals in the Fifth Circuit in the *Rachael* case, by denying the petition of the State of Georgia for Writs of Mandamus and prohibition (probation) to vacate the stay. The nature of issues before the Supreme Court and the significance of this decision are quite apparent.

WHEREFORE, Petitioner respectfully prays:

(a) That the remand order of this Court be forthwith recalled and stayed pending a review of the order by the United States Court of Appeals for the Fifth Circuit.

(b) That the Court grant petitioner such other relief as from time to time may appear just and proper.

John D.Due, Jr.
Carl Rachlin
540½ West Brevard Street
Tallahassee, Florida

John D Due

By
John D. Due, Jr.

APPENDIX "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CITY OF TALLAHASSEE

vs

[illegible] GORDON   No. [illegible]

MEMORANDUM OF LAW
IN OPPOSITION TO MOTION TO REMAND

1. [illegible]

2. [illegible]

3. The [illegible]
[illegible] v. [illegible] F. 2d [illegible]

4. [illegible]
[illegible] v. [illegible]

5. [illegible]
[illegible] v. [illegible]

[illegible] v. [illegible]

[illegible]

[illegible]

[illegible]

Criminal Appeals (includes app. from Municip Ct)

① Within 90 days from judgment or sentence.

② Notify clerk of ct (here Magee) in writing of appeal

- depositing filing fee as prescribed by law with clerk of ct.
  - unless insolvent

- clerk sends notice to app. ct.

③ Notice to prosecut. from Δ.

* ④ Within 20 days after filing notice of appeal, appellants file with clerk of lower ct (+ copies to atty of record for state) of assignments of error + direction to clerk for making up the record on appeal; said direction to ~~[illegible]~~ designate portions of record, proceedings + evid to be included (may be one document.

Rule 6.7 (G) Formal exceptions not nec. in order to assign error.

*

Rule 6-9

* Record is prepared after expiration of period allowed for filing directions to clerk as to record & to be given to App. Ct.

* Within 40 days from date appeal is taken, Δ shall file appeal record with clerk of App Ct. & copy to atty gen.

- Clerk's costs by Δ unless insolvent.

6.11 Briefs

Fla App Proc:

① Commencement of App. -

Rule 3.2 ↑

ⓐ File notice of appeal
- deposit filing fee

ⓑ Done within 60 days of decree of ct.

Form: ① Title of ct.
② Style of cause from which App. is taken
③ Title of ct to which App is taken
③ Δ is app. + name
④ opposing party (name + ad)
⑤ Nature + date of decree
⑥ date, book + page of pub. record
→ ⑦ App. ct gets juris upon filing.

ⓒ

ⓒ - only to clerk of ct.

(II) Within 10 days of not. of App., Appellant files his assignments of error with clerk of lower ct.

Record on Appeal

② Constituted by:

Orig record or transcript or stipulated statement.

– Transcript costs to appellant

~~Doubled spaced~~

~~– Margin of 1" [illegible]~~

Duty to prepare is on clerk.

* – Appellant's [illegible]

Appell. may prepare record on appeal.

③ Direction to Clerk as to what to include in Record.

(Within 10 days of NOT of App)

④ Submittal of Brief of Appellant.

30 days after filing transcript of record

40 Days before record-on-appeal is required to be filed in App Ct.

→ App shall serve one copy of brief + appendix to appellee + orig + 1 copy to clerk of App Ct. with proof of serv on appellee.

E24.08 Appeal to circuit ct.

1. Weight of Evidence doesn't support the order
~~2. Deprived of Right to Counsel~~
3. Procedure at trial violated due process of law as guaranteed by Art _ Sec _ because:
    a) Statute was not intended to apply to homosexual solicitation
    b) Statute ~~[illegible]~~ is unconst. vague
    c) " discriminatorily applied
    d) ~~[illegible]~~ Deprived of right to Counsel

Mooney v. Holohan 294 US 103
Alcorta v. Texas 355 US 28
Napue v. Illinois 360 US 264
Brady v. Md 373 US 83.

All [illegible] stand for proposition that the "criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated."

Warren CJ concurring at P. 564.
Estes v Texas

Quote at length P. 564 ~~56~~ on

*

Also Turner 379 US 466

And Court in Sheppard again

In Rideau v. Louisiana 373 US 723 (1963)

The Sup court found that televising the ~~confession of~~ defendant in the act of confessing was inherently invalid under the due process clause without showing demonstration of prejudice or a nexus between ~~[illegible]~~ the televised confession and the trial. id at 729

Similarly in Turner v. Louisiana 379 US 466 (1965). The court struck down a conviction on the ground prejudice was inherent in it.

Again in Gideon v Wainwright 372 US 335 (1963) and White v Maryland 373 US 59 (1963) practices were found to violate a notion of fairness ~~inherent~~ fundamental to proper due process.

-7 Use of C.C. is sufficient to reverse conviction even if other evid is suff. to support it. Lyons v. Okla 322 US 596

Payne v Arkansas 356 US 560

Estes v. Texas 381 US 532 found that the use of television cameras in the courtroom was inherently violative due process notions of fairness; no prejudice was required by the ~~majority~~ opinion of the court

The basis ~~of~~ and chief function of the court is to ascertain ~~find~~ ~~proof~~ truth. The additional payment of witnesses, already retained by the police department for investigatory purposes in exchange for bringing charges against ~~[illegible]~~ alleged violators in no way aids the quest for truth. This additional payment cannot be said to contribute to fairness of the police officer or of the ~~[illegible]~~ process. Rather it injects an irrelevant factor into court proceedings. ~~Studies~~ Everyday human experience teaches us how such a bonus can affect a person's judgment; sometimes so subtle as to go unnoticed by the observer himself.

Enum

① Temptation to accuse [illegible] facts

② Affects testimony so that witness will attempt to rearrange facts

— quality of testimony is affected.

Enumerate

then give studies to show how the implanting of an idea can affect perceptions.

Then studies that show that ~~ambiguous~~ "S" elicit "R" that [illegible] subject expects.

— affect of passage of time

Then show how this particularly likely in a situation where a Negro is [illegible]

8-1 Nov 1964

In Turner v. Louisiana 379 US 466, the Sup Ct invalidated a conviction because ~~the sheriffs [illegible] [illegible] [illegible]~~ two deputy sheriffs who were chief prosecution witnesses were constantly in the presence of the jury, ~~although~~ throughout the trial period, although the proof of bias was made. It was the "potentialities that went on outside the courtroom during ... the trial [that] may well have made these courtroom proceedings little more than a hollow formality. at p. 473]

It is ~~then~~ then emphasized that such close interaction between jury and witness would be sufficient to undermine the basic guarantees of due process, but the role played by the witness-deputies made the association even more untenable.

The underlying theory of reversal here, to quote Justice Warren in his concurrence in the Estes case was the "extreme prejudice inherent" in the practice". at p. 562 (mine)

It is not enough to observe the formalities of a trial when the processes that got the case that far are inherently laden with prejudice.

~~For a procedure to violate the requirement of due process [illegible] that the ct must "substantially detract from that goal" [of goal of a fair trial]~~

As to due process, "the only relevant ~~[illegible]~~ constitutional consideration is that the accused be ~~afforded~~ accorded a fair trial." ~~Opinion of~~ Harlan concurring in Estes, Texas at 587. If the procedure in question "substantially detracts from that goal" ~~[illegible]~~ id., due process requires that its use be forbidden. Id.

In Estes the introduction of television was held to affect the performance of all those involved in trial process.

Need psychologic evidence.

2/17/70

Disqualification in a criminal prosecution or penal action might results from a right to, or interest in, a fine, penalty, or forfeiture to which the accused would be subject upon conviction

~~§ 166~~ 70 CJ p. 199

An interest in a reward to be paid on conviction was held not to disqualify.

70 CJ p 199

Fla Stat: 902.19 (4)
932.3?

What is witness fee?

Blacks: A fee is "a fixed charge or perquisite charged as recompense for labor + trouble, a reward, compensation, or wage given to a person for performance of professional services or something done or to be done.

e.g. being a witness.

Witness: "one who testifies to what he has seen, heard, or otherwise observed"

Blacks

"A person whose declaration under oaths (or affirmation) is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit

Dillard: "We were paid a flat salary of $15 per night if we made no cases. If we made cases, then it took much more work. We had to go back down to the police station + give statements + put in a lot more time + we were paid $10.

902.19

"(4) No sheriff, deputy ......
or other person employed

Legislative history
§ 1 Ch. 63-508

1964 Op. Atty Gen 064-69 May 28, 1964

Public officers within the purview of subsection (4) of this section, who are also within the purview of § 90.141 who appear as official witnesses before grand juries & prosecuting officers authorized to file informations, are

→ compensated under § 112.061, as amended when they testify as to matters coming to their attention as a direct result of their being law enforcement officers

— This means that traveling expenses only are recoverable, & then only if you are under purview of 90.141.
i.e. 112.061 refers only to traveling expenses as does 90.141

[Normal witn.] 90.14 pays $1/day in J.P. ct + travel exp.

90.141 says
Law Enf. Off. - per diem expenses

112.061 refers to living expenses not travel exp.

Any L.E.O. of any municipality, county or the state who shall appear as an official witness to testify at any hearing or law action in any court of this state as a direct result of his employment as a L.E.O. shall be entitled to per diem + traveling expenses provided for state employees under § 112.061

Sup Ct of Mich

Glass v Mackie 122 NW 2d 651, 370 Mich 482

holds that an employee of the highway dept had an interest in the outcome of a condemnation proceeding & such interest disqualified him from being presiding and deciding commissioner. – Followed Tumey Myers Offutt line of reasoning (applicable to judges of fact.) Cited from O'Donoghue v US 289 US 526 at 531

Italicized in orig

Federalist paper, Hamilton: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will."

People v Cheeon 29 ~~US~~. Says fee syst. ok – not viol. of d.p. –
- pecuniary interest not great enough because jury decided issue of fact.
- didn't seem to affect jury.

Small fee – bad dec.

KN75

·6F74
C5

1. Evid. doesn't support verdict
2. R/C - use of police Testimony
3. Entrapment

SCt. case - relevant
where jud. officer

d.p. - so unfair can't let judg. stand

State pro = State agency
∴ - standing

municipal rules - effective date ?

Indictment.

Tumey v. Ohio
(1927) 273 US 510, 47 SCt. 437, 71 L.Ed 749

Turner v. Louisiana 379 US 466

T2-6-1100
Rm Montefiore
Michael Whittenberg

~~349 US 11, 14, 75 S.Ct. 11, 13 99 L Ed 11~~

In Re Murchison | 349 US 133 | 75 SCt 623, 99 L Ed 942

(1954) ~~B~~Black for Ct 6-3

P. 136

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." ~~2 [illegible]~~

IMirie I

Tumey v Ohio stands for the proposition that a "possible temptation to the average man as a judge .. not to hold the balance nice, clear and true between the State + the accused, denies the latter due process of law." TvO 273 US 510, 532,

"Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its highest function in the best way "justice must satisfy the appearance of justice," Offutt v. US 348 US 11, 14."

In Re Murchison, ~~[illegible]~~ at p. 136.

~~Facts:~~ ~~S.Ct. held procedure in which judge acted as 1 man grand jury to determine if person should be charged with contempt charge & then acted as deciding judge — opinion was violative of d.p.~~ could not later

112.061 §10

(b) Each agency shall promulgate such additional rules + regs as may be nec. to effectuate the purposes of this section. Such rules + regulations shall be recorded in the official minutes of the agency or [illegible] agency or in a special file in the main office of the agency.

show (2) ~~[illegible]~~ that agency includes any officer or agent, or commission or unit of gov created pursuant to law
i.e. includes police

this applies only to Traveling Expense
— legis intent — (1) a + b.

1941 Op. Atty Gen. Special duty

Municipal police officers come within the protection afforded by Workmen Compensation act while rendering services for which they would be entitled to receive payment.

— in employ of P.D. + can't get outside fee.

~~This objection (1&2) should not have been made in motion to quash the indictment~~

Motion in arrest of judgment ~~is not available~~ Reaches such errors that are apparent on record.

Hurst v State [18 Ala. 87]
160 So 358

1. Section 902.19 (4), adopted by the municipality as an ordinance, forbids the payment of witness fees, et al. to persons employed by the police department. It is clear from the reading of 902.19 as a whole that this prohibition ~~refers~~ applies to testimony leading the filing of an information

1. The payment of the prosecutrix Dillard for her testimony leading to the prosecution filing of an information ~~is a violation~~ ~~of~~ Section 902.19 (4) of the Florida Statutes, adopted by the municipality as an ordinance; and

1. The information filed against defendant is invalid and ~~[illegible]~~ ~~on testimony paid for by~~ fatally defective because ~~it is based on the testimony of~~ it was created by a procedure ~~in violation~~ violative of section 902.19 (4) of the Florida Statutes.

2. The information filed against defendant is invalid and fatally defective because it was created pursuant to a procedure violative of sections 90.41 and 112.061, of the Florida Statutes.

3

~~Due process requires that a procedure is void when the process ~~which~~ gives an officer of the court, in this case a police officer, a monetary reward ~~for~~ over and above his salary for doing an act ~~[illegible]~~ for which his salary has already compensated him when the ~~said~~ act ~~[illegible]~~ in question ~~[illegible]~~ leads to is the arrest ~~[illegible]~~ of the defendant.~~

~~A procedure which results in~~

An arrest which results in the ~~[illegible]~~ police officer ~~getting paid~~ receiving additional compensation contingent upon ~~[illegible]~~ acts leading to an arrest ~~[illegible]~~ over and above his ~~[illegible]~~ salary which already paid him for said act violates due process.

It has long been held that the only relevant consideration when determining if a procedure violates the dictates of the constitution ~~[illegible]~~ & irrespective of good faith or bad faith of the prosecution ~~[illegible]~~, is Was the accused been accorded a fair trial.

~~Acts leading to an arrest when compensated by a normal salary and an additional fee ~~[illegible]~~ violates due process when done by police officer~~

It is a violation of D.P. for ~~[illegible]~~ police officer to receive a fee contingent upon making an arrest, ~~especially when the~~

In applying this test the Supreme Court has found that a procedure wherein a judge would receive the costs paid by defendants in cases of conviction. Tumey v. Ohio 273 US 510, (1927) Tumey stands for the proposition that a "possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law" at 532. (Italics supplied)

Similarly in In Re Murchison 349 US 133 (1954) Justice Black wrote for the majority, "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law endeavours to prevent even the probability of unfairness."

After noting this high standard that due process maintains for the judicial tribunal as explained in Tumey, Black concludes, "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its highest function in the best way "justice must satisfy the appearance of justice." Offutt v. United States 348 US. 11, 14. In Re Murchison supra, at 136.

Holding in In re M.:

A judge acting as a 1 man grand jury could not convict for contempt ~~charges~~ witnesses who he believed testified falsely or inadequately before him in secret grand jury proceedings.

It should not be necessary to show ~~the showing of~~ actual prejudice ~~is not~~ as a prerequisite for reversal. The Supreme Court often has found instances where isolatable prejudice is not necessary to invalidate a conviction. Though it is true that in most cases involving claims of due process deprivations a showing of identifiable prejudice to the accused is required, nevertheless at times a procedure employed by the ~~prosecu~~ State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. In re Murchison, supra, Tumey v. Ohio.

T v. O at p. 532

"The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self sacrifice could carry it on without danger of injustice. P. 532 ~~Every procedure which would offer a possible temptation to the average man. — to forget the burden of proof required to convict the Defendant, or which might lead~~ him not to ~~hold the balance nice, clear and true between~~

Italics —

TAYLOR, SEVERT, H. JR. VS. LOUISIANA 1961

Society Of Wisconsin

Please Retain Original Order

NO. 57,562

STATE OF LOUISIANA
-vs-
SEVERT H. TAYLOR, ET AL

PROCEEDINGS
AUGUST 10, 1961

AUTREY REPORTING SERVICE
OFFICIAL REPORTERS
SHREVEPORT, LOUISIANA

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR PARISH OF CADDO
STATE OF LOUISIANA

STATE OF LOUISIANA : :
-vs- : ; No. 57,562
SEVERT H. TAYLOR, DELORIS McGINNIE, : :
MARIE McGINNIE, HAROLD L. BETHUNE, : :
DAVID JAMES DENNIS and HARRY BLAKE : :

TRANSCRIPT OF PROCEEDINGS in the above entitled and numbered cause before His Honor, ROBERT J. O'NEAL, Judge of the First Judicial District Court of Louisiana, at Shreveport, Louisiana, on the tenth day of August, A. D. 1961.

APPEARANCES:

JOHN A. RICHARDSON, JR.,
District Attorney
C. J. BOLIN, JR.,
Assistant District Attorney
Representing State of Louisiana

JESSE N. STONE, JR.,
Shreveport, Louisiana
Attorney for Defendants

MR. RICHARDSON: The Deputy Sheriff, Mr. Bridges, informs me that defense counsel wishes to have the four defendants who are in jail brought down. Of course this is a misdemeanor and he represents them. I have no objection, but I have nothing to do with that. It is between counsel and the Court.

MR. STONE: If Your Honor please ---

MR. RICHARDSON: Are the other two here?

MR. STONE: They are present in Court. If Your Honor please, the defendants in this case have requested of me that I request the Court that they be permitted to be present at every stage of this proceeding that is held in open court.

THE COURT: Ok. Bring them down.

(Additional defendants brought
into Courtroom)

MR. STONE: If Your Honor please, of course it is our position that we are perfectly willing to pay for the testimony. However, we take the position that everything that transpires in the presence of this Court and that concerns the guilt or innocense of these accused and that concerns the indictment or the bill of information filed against them and the objections thereto would be a part of the record, including the arguments of counsel in reference to it and the rulings of the

AUTREY REPORTING SERVICE, P. O. BOX 1325, SHREVEPORT, LA.

Court. I of course would insist that it be made a part of the record, subject, however, to our being given the right to brief it if the Court wants some authority for it.

Moreover, we would like to point out to the Court that it is our position that there is implicit in the very nature of these charges themselves certain constitutional questions that must of necessity in my mind be presented to this Court, and the whole manner in which the trial of these persons accused of an offense in this case may have to do with a question of due process; hence we feel that for that reason alone that whatever is said by the Court or the attorneys to the Court in reference to this matter may be a question of due process, and of course, we can only set it forth properly before any Appellate court if His Honor please, in the event that such case ever goes to such Court, by showing what was actually done.

MR. RICHARDSON: May it please the Court, the Supreme Court has ruled ---

THE COURT: The request is overruled. The argument of counsel is never a part of the evidence in the case, and the right to make the argument a part of the record is overruled.

MR. STONE: If Your Honor please, we wish to respectfully except to the Court's ruling, and ask that a bill of exception be noted, and that it be designated bill of exception number one.

We would like specifically at this time to again request that the statements made by the Court, if any, in reference to any facet or any phase of the arguments made by either counsel for the State or for the defense be made a part of the written record. We ask the Court, if the Court ---

THE COURT: The request is overruled.

MR. STONE: We would like to except to the Court's ruling at this time, and ask that this be labeled bill of exception number two.

THE COURT: The import of the Court's ruling being that any matter that is excepted to may be preserved, but the procedure in the case is not to be taken down and made a part of the record. As I understand the law, only matters excepted to and preserved by bills of exception become a part of the record for the purpose of appeal. The suggestion that the testimony and the argument of counsel be taken by a Court Reporter will be permitte only at the expense of the defendants. This being a misdemeanor and a criminal case, the evidence will not be taken at the expense of the State.

Proceed with your argument.

MR. STONE: If Your Honor please, the defendatns in this case, six in all, have been charged in a bill of information which states specifically that these defendants unlawfully violated the provisions of RS 14:1031 in that they did with intent to provoke a breach of the peace and under circumstances such that a breach of the peace might be occasioned thereby, crowd and congregate with others in a public place, towit, inside the Continental Trailways Bus Station building, located at 408 Fannin Street, Shreveport, Louisiana, and did fail and refuse to disperse and move on when ordered to do so by a law enforcement officer, namely Harvey D. Teasley, Chief of Police of the City of Shreveport, Louisiana. And of course, it concludes in the usual form, contrary to the following statute and so forth.

To this bill of information we have filed a motion for a bill of particulars on behalf of all of these defendants. As authority for this motion, we cite the Sixth Amendment to the Constitution of the United States, Article One Section 10 --- or rather in Article One, Section 10 of the Constitution of the State of Louisiana --- and the jurisprudence under that provision, particularly, Case 208, Louisiana 56, 22 Southern 2d, 740, and other cases which hold that the accused has the right to be informed of the nature of the charges against him with sufficient clarity as to enable him to safely plead thereto and adequately prepare his defense, and also that the Court should be advised of the charges against any accused who stands before it with sufficient clarity so as to enable the Court to regulate the evidence that is offered by the State and, for that matter, by the defense.

We submit that this bill of information lacks that clarity required by these provisions particularly in this particular: the manner in which these defendants are alleged to have crowded or congregated is not discernible from the bill, and we feel that this is important if for no other reason than because of the vagueness of the words, "crowded" and"congregated" themselves. To crowd has been said to mean to push or force, as one may crowd, push or force another off of the roadway, or off of the highway. It has been held to mean coming together in large numbers, as in mobs, and we might even suggest to this Court that to two young lovers on a moonlighted night who are strolling along that a little boy who tags along may constitute a crowd, merely because his presence is unwanted at that particular time. Hence we should know whether these defendants pushed or are alleged to have pushed, forced, or kicked their way into this bus station, or whether they came together in large numbers, or whether they are said to have crowded merely because their presence was unwanted in the bus station at that particular time. Of course, we have no way of looking at this bill of information and knowing what the prosecutor or, for that matter, what the law even intends when it says "crowds" or "congregates". Of course we don't think that that question, what the law intends, is one that can be appropriately argued on this motion for bill of particulars, and hence we reserve our argument on that for our motion to quash.

They are alleged to have congregated with others. We want to know with what others. You will notice that this indictment here or bill of information did not say that they congregated with each other, but it said that these people --- all of these people --- unlawfully congregated with others. We would like to know what others, and we would like to know where. This, too, may bear on the question as to the crowds. If three persons got into a telephone booth, we might be heard to say that the booth was crowded, and at the same time, it would of course be crowded because of the limited capacity of the telephone booth. At the same time, three or four people or six or even a hundred might come into this Courtroom here and the Courtroom wouldn't be crowded or the same persons, four persons, may come into this Courtroom, and this Court would in all probability take the position that the Courtroom was virtually empty. So we feel that we should know where and at what location these people are said to have crowded.

Now they are only several places inside the bus station that this alleged incident could have taken place; that would be out there on the loading platform, or in one of the restrooms upstairs, or in one of the waiting rooms. And all we are asking is where it took place. It seems to me that if they are said to have unlawfully crowded some particular place, that we at least ought to have some way of determining how they unlawfully crowded it --- the manner or the place, both of which may bear on the question of the unlawfulness of it, and for that matter, on the question of whether or not it was crowded. This seems to me now to be a very little to ask in an effort to protect and preserve one's property and one's liberties.

Now it is alleged that these defendants intended to provoke a breach of the peace. Here the State must prove a state of mind either from the circumstances or in some other manner. If we are charged --- if these defendants here are charged with attempting to unlawfully breach the peace, then we should be advised of the specific breach of the peace that the State claims was intended. It may be that we can show that the thing referred to by the State as a possible breach of the peace wouldn't be a breach of the peace at all. It may be further that the thing that is contemplated by the State as being intended as a breach of the peace could not reasonably or possibly have even caused a breach of the peace by these defendants, so we think we ought to know what breach of the peace it is alleged was intended here so we will be in a position to adequately defend ourselves, or at least to offer any evidence that may be available on the subject.

The defendants should also know when all of this happened. These defenses --- that is, the defenses of these defendants --- could be an alibi to all of this for all we know. These defendants could be called upon by the State on examination to prove their whereabouts at any given time ---

at any given time or within a given period of time --- and of course we wouldn't be in a position to answer for our whereabouts unless we knew what times we were going to be asked about. And all of this is apparently information that is within the prosecution's knowledge and we feel that we are entitled to this information.

In the final analysis of course the final decision as to whether or not these defendants are properly advised and informed herein will rest with Your Honor. The defendants are under a presumption of innocense; their guilt must be proved; yet their opportunity to use every available defense or aid in their defense should be preserved, and if their guilt cannot be proved without shrouding or shielding the facts and circumstances of their alleged guilt in a cloak of secrecy, even from themselves, then of course they should go free. We suggest that if this --- and it is a cloak of secrecy --- is to persist up until the time of the trial, that then there is no way that these defendants could possibly adequately prepare themselves for the trial on these charges. And again, as I say, it would seem to me that all of the material information that could seem to better inform these defendants of the charges against them would of necessity aid in the proper dispensation of justice.

Now, I would like to point out to the Court one other thing. Many of the cases have held that the test of whether or not an indictment or a bill of information --- and I will be glad to brief this if the Court wants me to --- whether or not an indictment or a bill of information is sufficient --- the test should be whether or not such an indictment or bill of information provides sufficient information to permit a plea of former jeopardy if a like bill of information or indictment were filed against the same defendant. Now we submit that you can get two bills of information that read exactly like this one --- the fact about it, you could take this bill and made a carbon copy and make duplicate originals, and file one this morning, and one this afternoon, try one this morning and try the other this afternoon, and the person who is tried this afternoon could not plead former jeopardy on the basis of this bill of information. And we say that because of this reason; it lacks specificity in that you can't look at it, you can't tell where the incident happened, you can't tell the manner in which it happened; for instance, if a person were charged this morning for being in the so called "white waiting room" of the bus station, and turned right around and went right over to the so called "colored waiting room" of the bus station, they could be charged with two identical bills or, under the position taken by the prosecution, you can charge them with this bill no matter which side they went in, no matter what time they went there, no matter what they did after they go there, and the only way that we could discern whether or not this case was one subject to a plea of former jeopardy would be to wait until after the defendants were tried and either freed or convicted, and look at it and find the similarities in the evidence that was offered in the two cases.

We are saying, in other words, that it lacks the clarity required in that it doesn't show with particularity the place, it doesn't show with particularity the time, it doesn't show with particularity the manner in which the defendants are alleged to have crowded, or whatever it is that they are alleged to have done here, and it doesn't show with particularity the breach that the prosecutor claims was intended, or that could have reasonably been occasioned by their acts, and it leaves us utterly helpless and for that reason we feel that we should be granted these particulars, and for the additional reason that our rights to these seem to be well grounded, not only in the constitutional authority of the State of Louisiana and of the United States, but as well in the jurisprudence of the State of Louisiana. We would be very pleased if required to submit a memorandum of authorities that we could have ready this afternoon.

MR. RICHARDSON: May it please the Court, I believe the only matter before the Court at this time on the motion for bill of particulars is whether or not the bill of information charges with sufficient information to bring a charge of disturbing the peace under Article 103.1 of the Louisiana Criminal Code. I want to discuss first the statute itself in an effort to convince the Court that it does so charge a valid violation of this particular statute. The

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statute reads "whoever with intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned thereby crowds or congregates with others in a public place and who fails or refuses to disperse and move on when ordered so to do by any law enforcement officer of any municipality or parish in which such act or acts are committed, or by any law enforcement officer of the State of Louisiana, shall be guilty of disturbing the peace."

This statute has several elements. First is the matter of intent, second is the matter of crowding and congregating, third is the location, but coupled with all of them as an essential and necessary ingredient is the phrase "and" --- not "or" --- but the phrase "and who fails or refuses to disperse and move on when ordered so to do by any law enforcement officer of any municipality or parish in which such act or acts are committed". May it please the Court, this is a plain and simple disturbing the peace statute. This is a situation in which law enforcement officers, when they see in their judgment that a breach of the peace is about to be committed, or might be committed, they are not obligated to stop and wait until it is committed; they have the authority under this statute, which is a part of the Louisiana Criminal Code, to order certain persons to disperse or move on, or to disperse and move on.

Let me give an illustration. Suppose for example, a person had the permission and authority to conduct services of any kind or speaking engagement of any kind on the Courthouse Square, and suppose the remarks that he made incited the people; some of the people didn't like it; an officer was there and saw that a breach of the peace might be committed, he is not obligated to wait until one is committed, but he exercises the authority under this statute to order one or more of the persons either to disperse or to move on, or to disperse and to move on. Now these are men out on the front line of the enforcement of the law, keeping of the public peace, which is paramount in this country, and when he decides that one person or group of persons should disperse or move on, or should disperse and move on, and gives them that order, then it is an obligation of citizenship to obey that order. In the example which I just cited to the Court, it is possible that the officer might feel like it would be better to have a small group, in the illustration that I gave, that were conducting services to move on, even though they might claim that they were exercising freedom of speech, freedom of religion, or it might be the officer might decide that it would be better for the other people who were being aroused to move on. That is simply a matter which must be decided on the spot. The keeping of the public peace prevents anarchy, it prevents people from taking the law into their own hands, and it is the manner in which this country was established. The keeping of the public peace is a matter of the police power of the State.

Now turning to the bill of

information which has been filed in this case, it states very plainly that these people are charged on a specific date, they are named, the date is given, the exact citation of the statute is given, that they have violated the provisions of RS 14:103.1, which is a part of the Louisiana Criminal Code; that they did with intent to provoke a breach of the peace and under circumstances such that a breach of the peace might be occasioned thereby crowd and congregate with others in a public place, towit: the place is named, the street location is named, the City and State are named, and the important ingredient is also set forth in that they did fail and refuse to disperse and move on when ordered so to do by a law enforcement officer, and he is named, Harvey D. Teasley, Chief of Police, of the City of Shreveport, Louisiana.

Now, the Supreme Court of this State has ruled repeatedly that the real test on the sufficiency of meeting the constitutional requirements that a person must be apprized of the nature and cause of accusation or charge against him is that it must be such that it can serve as a basis of former jeopardy as counsel has stated, and also must be such that the Court can regulate the evidence sought to be adduced thereunder. We feel that this bill meets both of those requirements, because certainly these people were not ordered more than one time by Chief of Police Harvey D. Teasley to disperse and move on; certainly there is no showing that they were in any other place other than the place at 408 Fannin Street,

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Shreveport, Louisiana. We feel that they are amply apprized. Referring for example to paragraph one of the motion for bill of particulars, they ask to be advised of the manner in which it is alleged they congregated or crowded. Well, now, that is a matter of evidence. The State is not required to show what the evidence is going to be in a bill of information. A bill of information is not an index of the witnesses or the acts or the different things that might come up during the trial. The word "congregate"itself simply means gathering together. The word "con" is a prefix which means "together" or "with". A "convocation", for instance at a graduation exercise in college is a gathering together of people. A "congregation" of people in a religious sense is a gathering together of people in a place of public worship. We think that the words "congregate" and "crowd" have a very definite meaning, there is nothing uncertain about them, and counsel I believe has confused two things; first, is the matter of trying to reach the evidence of the State and requiring the State to outline all of its evidence in the bill of information, which he is not entitled to have, and secondly, I think he is confusing his argument on motion to quash. Some of the things he is talking about might come up on a motion to quash, but certainly are not applicable here. Whether the words "crowd" and "congregate" is not sufficient breaches the statute, not the charge.

Referring to paragraph two, the names of the persons with whom they are alleged

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to have crowded or congregated, we have named six people in the bill; certainly that is sufficient to make a crowding or congregation of people; a grouping together of people. To show that a request such as that could be certainly absurd, suppose in the illustration I gave a while ago that the police officer ordered the people to disperse and move on and some of them did disperse and move on and some of them refused, and he arrested those that refused, how would the police officer have the names of those that did obey the order? And those that obeyed the order might be crowding and congregating with those that violated the law, but the ones that did disperse and move on did not violate the law.

With reference to paragraph three of his motion, he wants to know the exact location at 408 Fannin Street, Shreveport, Louisiana, that they are alleged to have crowded or congregated with others. We have said inside that building. We think that is sufficient. Whether it was upstairs or downstairs or one room or another has nothing to do with the offense itself. The offense as outlined in the statute says "in a public building". It says many other things. It says in a public building, or upon a public sidewalk, or in a public place, and so on. There are many things delineated in the statute, and the State has limited itself by saying "inside a public building". The State could as easily have said "in a public place" or "at a public place" which would take the whole block in which the incidents occurred. We think the State has gone further than that and has not only set forth the building, but described the type of building, they have given the street location, they have said it was inside the building.

In paragraph four of his motion, he claims that he is entitled to be advised as to the specific breach that was allegedly intended by the alleged acts of your petitioners. Now, certainly that is one item that he certainly is not entitled to force the State to outline, because let me give the Court an illustration. A charge of simple burglary is entering a house with the intent to commit a theft. That is one ground of simple burglary. The State certainly should not be required to show in a bill such as that what the person intended to steal. The man who broke in himself might not know what he was going to steal because he didn't know what would be there when he got there. There are many illustrations that are just as applicable, but certainly the matter of intent which is in a person's mind, the matter of intent should not be outlined in a bill of information because that is something that can be determined, for instance in a jury case, after hearing all of the evidence and all of the facts and circumstances, and in a non-jury case it would be determined by the Judge. But moreover, in addition to that, if the Court please, the officer who is there at the scene and ordered the persons to disperse or move on, or ordered them to disperse and move on, certainly is not required to know and to outline just exactly what breach of the peace might be occasioned. He doesn't know, for instance, if excitement takes place and looks like it might be some real breach of the peace that could cause a great disturbance, he doesn't know whether the people in the crowd or the people who are congregating around, whether they are armed or not, whether they are going to be fiolent or not, or whether they are just going to be cat-callers, and I am not referring to these people; I am referring to any people. I am referring to the illustration I gave a while ago, about a man who has a right, for instance, to make a speech on the Courthouse Square, suppose he makes a Nazism speech, as people have done in New Orleans and elsewhere in this country, the people don't like it; well, the police officer when he is there, he doesn't know whether there is going to be violence or bloodshed, or whether there is just going to be mumbling, or whether there is going to be cat-calling, or what it is going to be, but he has to make a decision then in order to keep the peace of the community.

The same thing is true with reference to paragraph five for the simple reason that it is stated in the same manner, in just a little different language, and that is as to what specific breach could reasonably have been occasioned. Well, that is a matter of conjecture, because the police officer is not required to guess as to what the people are going to do. When he sees that a breach of the peace might result, then he is entitled to enforce this statute.

I would like to give one other illustration, if the Court please. I can remember in this very courtroom a case in which a man was arrested by State officers on duty and charged with drunk driving, or operating a motor vehicle while under the influence of intoxicating liquor. The man did not want to be arrested and he put up considerable resistance and considerable force, and as a result he was charged with resisting arrest. When the case came on for trial, Judge Galloway, for reasons that the Judge deemed sufficient, and for valid and legal reasons, held that the man was not guilty of driving under the influence but at the same time found him guilty of resisting arrest, and stated that it is the duty of a person to obey the officers. If the officers are wrong, that can be settled in another way and in a peaceful way and in a regular forum, but not in a street side brawl, not in a manner of resisting arrest, as in the illustration which I gave, but it is the duty of every citizen to obey the law enforcement officers.

Now in the illustration which I gave about the man driving under the influence, it turned out that he was not guilty, but nevertheless the officers had reasonable grounds to arrest him and they brought him in, and the man was guilty therefore of resisting arrest, even though the officers were

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wrong in their belief that the man had had enough that he should be found guilty of driving under the influence. There was no question in the illustration which I gave that the man had been drinking, but the Court found that he had not been drinking to the extent that it affected his driving; therefore he was found not guilty of the basic charge for which he was arrested, but he was found guilty of resisting arrest.

The same thing is true in a situation such as this statute. The officer has to make a decision there on the ground and when he makes a decision that one group or another or part of one group or part of another or both groups or part of both groups or whatever decision he makes in trying to keep the peace, he is not required to wait and see whether a breach of the peace will be committed, or how it will be committed, or whether there will be bloodshed or not, whether there will be weapons or not, but he exercises the authority that is given in this section to tell the people to disperse and move on. I think, if the Court please, the clincher to all of it is that if they had dispersed and moved on, then they would not have been arrested, they could not have been arrested, and they would not be here at all. Therefore, they themselves by willfully and deliverately disobeying the order to disperse and move on caused their own arrest. Now, they know all of that information, and we don't think that the State should be required to read their minds and put in the bill of information what breach of the peace they might have committed, or might have been occasioned by their actions. The officers who were there made the decision and exercised the authority under this statute. They are not required to second guess and to determine. It is very much as though, to give another illustration, although it might sound a little crude, if I point a pistol at someone and I know it is not loaded, but the other person doesn't know it is not loaded, he is placed in fear, then I am guilty of an assault on him with a pistol, even though I know in my own mind that I couldn't possibly shoot him, but he doesn't know that. So in this situation we find simply a plain disturbing the peace statute. We feel that the charge follows the statute sufficiently and delienates facts sufficiently that it meets the constitutional test of informing them of the nature and cause of the accusation against them, that it would stand as a matter of former jeopardy and that it is sufficient for the Court to regulate the evidence, and those are the tests that have been laid down by the State Supreme Court and which have been upheld by the United States Supreme Court.

MR. STONE: If Your Honor please, I shall be as brief as possible in rebuttal. I think that the prosecutor has very ably pointed out to the Court that under the statute the officer has to make a decision before he acts. Now I think that every honest, law abiding citizen would at least believe or want to believe that there must be something present, something in the manner of the

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defendants doing whatever it is that the officer must make the decision in reference to, that makes it necessary for the officer to make this decision. That is all we want to know. What it is that made it necessary for this police officer to order them to move on. Now that's all we want to know.

The word "crowd" is indefinite; it is susceptible of many meanings, despite the fact that the prosecutor simplifies it considerably. It can mean all of the things that I suggested a minute ago. It can mean that you push, you shove, you force, you come together in large numbers, and all we want to know is what it was that these people did that made Chief Teasley feel that he had to order them to do what he did, and when we know that, the question that we raise in reference to the manner of the crowding or whatever it is is clear.

Now the prosecutor has pointed out that he said in the bill of information, and he did, that this took place at 408 Fannin Street, Shreveport, Louisiana, in the Continental Trailways Bus Station building. That is just like saying that it took place in the Empire State Building in New York, if the Empire State Building were a public building, or better still, in the State Capitol. It took place in the State Capitol, numerous stories high, scores and scores and scores of offices, housing the Senate chamber, the chamber of the House of Representatives, and how in the world would an accused who is told that he is charged with having done something in the State Capitol know whereabouts in the State Capitol he was supposed to have done it. To me that is an almost perfect analogy, except for the fact that this place probably isn't as big as the State Capitol, probably doesn't have as many rooms, but aside from that, the analogy is perfect.

The prosecutor has pointed out that the police officer couldn't look into the minds of these people, which is true and determine what breach they had in mind. That is true. But if the police officer knows that their acts would have provoked a breach of the peace, then they can at least tell us what they allege is likely to have happened.

If Your Honor please, if would seem to me that we are doing a considerable bit of ducking and dodging and hiding when if this thing is as simple as the prosecutor says it is, if it is a simple case of disturbing the peace, then why can't we --- if somebody walks up, under this other statute on the next page of this thing, if somebody walked up and hit somebody in the mouth, the State would say that "John Doe hit Mary Doe in the mouth". If he says "with what", he would say "with his fist", or "with a hammer" or whatever he hit her in the mouth with. And if you ask how he hit her, he would probably say "he drew back and he hit her in the mouth with a hammer". That is about what they would tell us. And now what is it about the Shreveport bus station that makes it necessary for us to cloak these proceedings and couch the bill of information in such evasive language so as to lack the clarity that the law says we are entitled to.

I submit, yes, there is much to say about this statute that we hope to say in a motion to quash. In fact, the statute does say that whoever crowds or congregates, the statute does use those words. The prosecutor has the right to plead the statute, but he has the obligation under the law when called upon to furnish the particulars to particularize so as to meet the test of clarity laid down in both the Constitution of the State of Louisiana and the Constitution of the United States, as well as in the jurisprudence of the State of Louisiana. We submit that the statute notwithstanding he has not done that. Of course we hope to argue some of the things that the prosecutor has just suggested in a motion to quash at some later time but we think that we are entitled to this now. We are entitled to know this now and be able to know whether or not we have any grounds for any constitutional motion to quash, or whether or not any charge is actually made against these defendants, or what we are going to have to do in order to defend ourselves, and because some police officer felt something over at the bus station that may or may not have been true does not mean that we have to wait until we get on the trial of this thing to find out what it was that he sought to guard against. We think that we are entitled to know that so that we can come into Court and show that this didn't exist, or he was right, or come into Court and show that this couldn't possibly have happened, or that if it did happen, it wouldn't have constituted a breach of the peace. And I don't think that we have to wait until after all of the evidence is in to try at that point to find out exactly what did happen. That is why we think we are entitled to it now, prior to arraignment, and if we are going to safely plead, of course the law affords us that privilege or that right.

THE COURT: Counsel has indicated that he wants to file a motion to quash. I think so far as the motion for a bill of particulars is concerned, that it gives all of the information necessary on which the State is required to allege in order that the defendants may properly prepare the defense of this case. Of course knowing what counsel has in his mind, if true it may be that the statute would be invalid, but on its face this charge and the information furnished in the bill of information in our opinion is all that the defendants could require in order to defend themselves, and that is the purpose of the motion for a bill of particulars.

The question of whether or not it would serve as a bar to another plea, if the State were required to name the exact spot that they were at the moment that the police officer told them to move on, and the evidence in the case showed that they were five feet over here, instead of at the particular place the State alleged, the plea would be filed. I think the charge here as to the place is definite enough in order for the defendants to defend themselves. The location, the name of the building, its location, and the person who told them to move on, and from what little study I have given to this act, I think that the case depends on when a person goes to a place and the police officer tells them to move on, the the crime is complete, whether or not the contention was well founded or ill founded that the police officer may be mistaken, and of course, the State is not required to state what was in the minds of the defendants. The State may say that it was to do this; all the defendants would have to do would be to come in and say "that wasn't on our minds; we intended to do this", and the other may be the real violation of the law, but the defendants couldn't be convicted if the State didn't prove what is alleged in here. Let the motion for a bill of particulars be overruled.

MR. RICHARDSON: May it please the Court, I believe this was the day set for the argument on all motions. Counsel furnished me with a copy of this motion day before yesterday. If there are any more motions, the State is prepared to argue them now, because we understand that the Court has ordered arraignment for tomorrow, which is Friday.

THE COURT: I told counsel yesterday that I would hear this, and then let him file the motion to quash today, and we would argue that in the morning.

MR. STONE: If Your Honor please, in order to keep the record straight, I would like to enter defendants' exception to the Court's ruling with reference to the motion for a bill of particulars, and ask that the exception be noted, bill of exception number three.

I have at this time, if Your Honor please, a motion to quash which I propose to file. I am not, however, prepared to argue this motion at this time. I believe that there is authority to the effect that on a motion to quash an indictment or information that the defendants have the right to introduce evidence and to offer the testimony of witnesses as to materials relevant to the defense of the case. For those reasons, I wish to state that I am not ready at this time to argue the case; however, if Court feels that I am incorrect in my appreciation of the law, I will be content to reserve my exceptions and a bill to the ruling of the Court and argue the motion to quash at this time.

MR. RICHARDSON: If the Court please, I have requested counsel ever since last Friday if he would to go ahead and file his motions. He is now apparently asking the Court for a ruling on what he can do if he files his motion to quash. Now, may it please the Court, I would ---

THE COURT: Some motions to quash are on the face of the papers and some are based on evidence. I don't know what the motion to quash is based on.

MR. RICHARDSON: I don't know his grounds; I haven't seen it. If he will file his motion, then we can argue whether he is entitled to take evidence or not, but until he files it, I don't think either the Court or counsel ---

THE COURT: If you have your motion ready, file it.

MR. STONE: Of course I would like to point out, as the Court said a minute ago, that we have been given the right to file this motion after a ruling by the Court on the bill of particulars.

MR. RICHARDSON: The Court has ruled on the motion for a bill of particulars.

MR. STONE: And of course you have announced ready to argue it at this time. I can't quite see how you could be ready to argue it if you haven't seen it.

MR. RICHARDSON: Well, if I could see it, I will certainly be ready to argue it right now.

MR. STONE: Your Honor please, may we have a recess sufficient for me to clamp these together?

THE COURT: Yes.

(SHORT RECESS)

MR. STONE: If Your Honor please, with reference to the motion to quash, it can be seen that in paragraph four we have alleged in the alternative that this statute in question is being administered in a manner so as to deny members of the Negro race rights secured to them under the equal protection and due process clause of the fourteenth amendment to the Constitution of the United States by exacting of them criminal penalties for seeking to use facilities not specifically designated for members of their race, which is nothing more than a claim of discrimination in the administration of the statute in question. We think that we should be permitted to prove this discrimination by affidavits or by calling witnesses who will in their testimony we think, or we hope, at least, substantiate this allegation.

We allege that the statute is so indefinite as to fail to fix a reasonable standard of guilt by which any defendant or would-be offender of the statute would know beforehand that the acts that he was about to do would constitute a violation of the law or a violation of the statute. We feel that as to this that we should be able to show the action of the police officers on the scene at that particular time in an effort to show that these defendants could not possibly have had any way of determining that they would be arrested merely because they went into a waiting room as interstate passengers. We feel that if we are correct in our appreciation of the law to the effect that we can offer evidence and affidavits and witnesses on behalf of the motion to quash that a date should be assigned on which we can do this.

MR. RICHARDSON: May it please the Court, the motion to quash, under Louisiana law as found in Article 286 of the Criminal Code of Procedure, any defect apparent upon the face of the indictment is one ground of a motion to quash. And of course that is triable without evidence on the face of the papers after argument of counsel and citation of authorities and the ruling of the Court, or any defect fatal to the validity of the proceedings may be set up in a motion to quash the indictment, whether such fatal defect be apparent upon the face of the record or is such as can be established only by the production of evidence.

If the Court please, that relates to the proceedings in Court. That relates to the manner in which the prosecution is being had, that is, by affidavit, or information, or by Grand Jury indictment. I think this is borne out by the fact that all the annotations under 286 with reference to taking of evidence and hearing of evidence on a motion to quash is on the validity of the proceedings; that is, the manner in which the proceedings were being prosecuted, such as the composition of the Grand Jury, either because of some of the questions about no Negroes on the Grand Jury, or no Mexicans on the Grand Jury in San Antonio, or in instances where claims have been made that a person was not a qualified Grand Juror because of lack of residence or other things. So that it is the validity of the proceedings; that is, the manner in which the prosecution is being brought whether by affidavit or information or indictment. Now there is no such matter here before the Court because in the first place there is no Grand Jury indictment, in the second place there is no affidavit upon which the State is basing this

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prosecution because prosecutions in the District Court are always by bill of information of the Distric Attorney. Now that is the validity of the proceedings is by bill of information filed by the District Attorney informing the Court of the violation.

We submit that these other matters which he now claims under paragraphs four and five, or whatever the other one was, relate to the merits of the case in an effort to show that they were not there with the intent to breach the peace but that they were there asserting certain constitutional rights. Now those matters are matters of defense. Those matters are matters to show that the statute itself is either not constitutional because of their constitutional rights, or that the statute itself is not constitutional because of some defect otherwise in the statute, such as failure to show certain things.

Now, when he talks about the administration, that the statute is being administered in a fashion so as to deny members of the Negro race, there is nothing in this bill on the face of it showing whether they are white or colored, and actually in the enforcement of this statute it makes no difference. This statute is not a white and colored statute. This statute is a disturbing the peace statute. There is no such word as segregation or integration. This statute can be enforced, in the illustrations that I gave on the other argument, against people exercising freedom of religion, against people exercising freedom of assembly, against people exercising freedom of speech. Then the matter of the constitutionality will come up, but certainly not the matter of colored people or white people.

Now then with reference to the facilities, there is nothing in the bill about use of facilities. Now this statute has many things that are enumerated in it. One of them, for example, says something about ---

THE COURT: Under his argument and his statement as to Article four and five, they might be good for an arrest of judgment ---

MR. STONE: If Your Honor please, may I suggest that I have no attempted to argue a motion to quash.

THE COURT: He is arguing it, but I was trying to stop him from arguing it. Article four and five pertain to the merits of the case and would be the basis for a motion in arrest of judgment, and not a motion to quash the indictment under this law.

MR. RICHARDSON: When will Your Honor hear the argument on the motion to quash itself then, today or tomorrow?

THE COURT: I will hear him on the motion to quash.

MR. RICHARDSON: Any time is all right with the State.

THE COURT: At this time, if you are ready to argue it.

MR. STONE: Do I understand that the Court is now ruling that as to Articles four and five of the motion ---

THE COURT: I overrule the motion to be permitted to take testimony under articles four and five at this time.

MR. STONE: And that we can reserve our right to do so by filing a motion to quash if we desire at a later date?

THE COURT: No, not a motion to quash, but a motion in arrest of judgment if there is a conviction.

MR. STONE: A motion in arrest of judgment. I understand.

If Your Honor please ---

THE COURT: It is like saying that the law against driving while under the influence of liquor was passed to get those who drink a whole lot and not those who don't drink much and as enforced it is only enforced against one segment of society. That would be grounds not to quash the law but for motion in arrest of judgment.

MR. STONE: If Your Honor please, may I argue this point to the Court for a minute?

THE COURT: What point?

MR. STONE: In reference to our right to raise by motion to quash the points raised in articles four and five?

THE COURT: No, I do not care

to hear argument.

MR. STONE: I didn't understand you, sir?

THE COURT: No, I don't care tohear argument on the right to take testimony.

MR. STONE: We wish to, if the Court please, we wish to take exception to the Court's ruling to the effect that we will not be able to offer evidence and to call witnesses in support of our motion to quash, and to ask that a bill be reserved and it will be I believe bill number five.

If Your Honor please, this may sound kind of like repetition, because it is repetitious to some extent, but we set forth in article one --- I might have two ones --- I refer to the second one "Article one; that the statute defining the offense with which your petitioners are charged herein should be quashed for lack of clarity in that the language of the statute lacks the clarity required by Article One, Section 10 of the Louisiana Constitution and Sixth Amendment to the Constitution of the United States in that it fixes no ascertainable standard of guilt".

If Your Honor please, now, any two or any four of these defendants could walk into the front door of the Courthouse downstairs and could walk up to the bulletin board, looking for the room number of this Courtroom, and a police officer could walk up to him and say "move on" and then that man would have to wait until he came to court, or all of them would have to wait until they came into Court and were tried, before they would know whether or not they were violating any law, and that is because of the vagueness of these words "crowd and congregate". In fact, on the trial of this case, I am sure that we will prove that there were four people in the room over there. Would it have been any different if there had been two? We don't know. Would it have been any different if there had been just one? We don't know, because there is no way of looking at the statute and telling from the statute whether or not we are crowding or congregating, and whether or not, if we refuse to do whatever the police officer says to do, that we are violating a law, and remember, you must have both; you must have both; you must crowd and congregate, and you must refuse to move. Now if it was just a question of refusing to do what the police officer says do, then certainly it would be easy to determine whether or not one was guilty, because if the police officer walked up and said "move" and you didn't move then you were guilty, but the statute doesn't say that. The statute says whoever crowds --- unlawfully crowds and congregates, and there we know nothing about what is the unlawful crowding; we know nothing about --- it says nothing about what constitutes crowding or what constitutes congregating within the intent of the law, and what this statute does is to make the police officer the arresting officer, the Judge, and the jury insofar as this is concerned; this statute is concerned. He alone, according to this statute, has the ability to determine beforehand whether or not one is crowding and whether or not one is congregating, because we can't look at the statute and find any basis at all by which we ourselves could tell it. We just can't tell whether or not you are crowding or whether or not you are congregating.

Now then, if this statute does --- even if that part of it were all right, that part about the crowding and congregating --- if you didn't have to worry about that, even if it fixed an ascertainable standard of guilt, which it does not do, the statute would still violate the right of the defendants to peaceably assemble as guaranteed by the Constitution of the United States, First Amendment, and Article One, Section 5 of the Constitution of the State of Louisiana.

People have the right to assemble for any lawful purpose, and of course there is no way of looking at this statute and discerning from it that you could even get together for any reason at all, because the statute is just that ambiguous and unclear.

The statute violates the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that it exacts a penalty from these defendants that is not exacted from labor unions and a whole host of other organizations, I believe, that are included in this statute, and we contend that this, too, is an improper discrimination under the Fourteenth Amendment to the

Constitution of the United States.

I would like to point out in reference to --- I would like to make mention of articles four and five, even if the Court should feel that the Court would not pass on them at this time. We think that they are appropriately argued under a motion to quash, and lest we waive our rights, we at least would like to attempt to argue this phase of this motion under the motion to quash.

THE COURT: You can argue it as on the face of the papers.

MR. STONE: If Your Honor please, these defendants are arrested --- we claim, under the fourth paragraph of this motion to quash, that the statute under which these defendants are charged violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that it has for its purpose furthering and maintaining the State's policy of forced segregation in the State of Louisiana at the places designated in the statute.

I would like to point out to the Court something of the history of this statute and ask the Court to take judicial cognizance of it. This statute was enacted at a time in the State of Louisiana when we were having the luch counter sit-in demonstrations all over the South. It was sometime I believe in 1960. Prior to that time, we had section 14:103 --- I believe --- what is now Section 14:103, which set forth a whole host of acts as constituting disturbing the peace, and of course it is our position and we think that the history of the statute will bear us out, and of course it had been our hope to be able to introduce on the trial of this case certain printed matter from the Louisiana Legislature with reference to this particular statute that would bear these arguments out, and we can't do it now, because we are taking them up at this time, but it is at least clear that the statutes were an attempt on the part of the Louisiana Legislature to maintain enforced segregation at the lunch counters and public buildings and other places in the State of Louisiana and thus deny to Negro people the rights secured to them under the Constitution of the United States, and we think that this of course would of necessity fall and particularly if we are able to show the history and the manner in which this statute is being enforced.

We had hoped to be able to show the Court by witnesses called that there were others present at the time these defendants were arrested, as the prosecutor has said in the indictment "in the presence of others" and he refuses to name the others. We submit it is because the others were not arrested, but only these defendants, when they, with their tickets in their hands, sought passage on interstate vehicles, that they were arrested and charged under this statute with disturbing the peace. Of course as I say we are being hampered in this regard because we are not now able to produce witnesses who would testify to that. I am certain that we can produce enforcement officers, some of whom may even be present in this Courtroom now, who will testify that only four Negroes were arrested and that these people had not gotten in the --- hadn't even been able to go within the near proximity of the information desk in the waiting room. Certainly it is apparent to us, even though it is difficult to prove, that this is perhaps the reason for the statute, and of course the reason for the reluctance on the part of some people to furnish the information that we seek.

We think that all of this constitutes a prohibited or rather is prohibited under the Constitution of the United States and for that matter under the Constitution of the State of Louisiana.

I must of course apologize to the Court for the seemingly unprepared manner in which I am having to present this argument, but I am taken completely by surprise in that I am not able to at this time offer evidence and witnesses on behalf of these defendants.

MR. RICHARDSON: May it please the Court, referring to the first paragraph of the motion to quash, which is the second one numbered number one, about the lack of clarity. Now Your Honor I think this, that the statute is as clear as all criminal statutes ever are; it says whoever does certain things; crowd and congregate ---

THE COURT: I haven't read the statute, so I can't say. I glanced at it ---

MR. RICHARDSON: I will be

glad to show Your Honor ---

THE COURT: Well, you can go on. I will take it under advisement and study it.

MR. RICHARDSON: All right, sir. That whoever does certain things. Now the things that they do is to crowd and congregate and fail to disperse and move on, or fail to disperse or to move on when ordered so to do. Now if these people were not violating the law, all they would have to do is when the officer tells them to move on is move on, but that for example, although these illustrations are short and brief, suppose I am going out Line Avenue going home, and I get up here to Jordan Street and I see that there are no cars coming from the right, and I have the green light and I want to make a right hand turn but the officer tells me to go on straight; he is directing the traffic. I would be foolish to say that I would have a right to turn right because the officer is mistaken, that there are no cars coming and I could make a safe turn.

We have certain laws and disturbing the peace is one of them in which the officer makes the decision and we have to abide by them; otherwise everybody makes their own decision whether they are going to obey an officer or not. We think it is a part of the Constitution and a part of citizenship that when peace officers that are there make decisions and make orders that they have the authority to do, whether it is traffic, whether it is disturbing the peace, or whatever it may be, that the citizens are obligated to obey that order.

Now take for example under the law of arrest. This is an old law; this has been in our Code since this Code was written in 1928; a peace officer, without a warrant, for example, may arrest a person when a felony has been comitted and he has reasonable ground to believe that such person has committed it, and in that instance he has to determine whether he has reasonable ground; otherwise he would have to go back and talk to a District Attorney or a Chief of Police or somebody to see whether or not he has reasonable cause to believe that that man has committed a felony, meanwhile the fellow will have escaped and gone.

The same way in Sub-paragraph four of our article 60, a peace officer has a right to arrest without a warrant when he has reasonable cause to believe that a felony has been committed. Maybe no felony was committed, but if he has reasonable cause to believe it and he has reasonable cause to believe that such person was the one who did commit it, he has got to exercise that judgment when he sees that person and bring him in. He may be wrong, but he has the authority to exercise that discretion, that judgment, and exercise the authority that is given by the law.

Counsel says that people might be together and a officer come up and tell them that they should disperse and move on, that they can't do anything until they get in Court to show that they had a right to be there. The statute is framed for disturbing the peace. It is not framed on segregation or integration.

He complains about labor unions being left out. There is a perfectly valid reason for that distinction because labor unions are subject to injunctions and picketing laws and the Taft-Hartley Law and a lot of other things in a special field of legislation and that is a valid basis for leaving them out. There is no basis for injunctions against people for failing to disperse and move on. It has to come under the criminal law. That is a valid distinction that has been made.

He talks about the right to peaceably assemble. Well there are rights of freedom of religion, and freedom of speech, but if the officer is there and the situation is such that a breach of the peace is about to be committed and he tells them to disperse and move on, if they are law abiding citizens, they will disperse and move on; if they are not, then they are violating this law; they are doing it intentionally and willfully.

He refers in article paragraph four that this is a segregation statute. That is his own opinion, if the Court please. There were a great many statutes passed by the Legislature in 1960, some having to do with Judges' salaries, some having to do with fiscal matters, some having to do with courts, some having to do with District Attorneys',some having to do with a lot of things, and just because it was passed in 1960 doesn't mean that it is per se a segregation statute. This statute is capable of being enforced against people who, for instance, as I used in the other illustration, a person gets on the courthouse lawn and makes a speech or conducts services, suppose he champions the cause of Fidel Castro, or suppose he believes in not saluting the flag, or many other things that are inimical to people that might be there, and the peace officer sees that trouble is about to erupt, he doesn't have to wait for it to erupt before he orders someone to disperse and move on, and I am sure that if it were a person espousing the cause of Castro or Nazism he would very likely make those people disperse and move on, and not the audience, and that would not be a question of segregation or integration.

On the matter of administering, that is a regular criminal statute. This is the first prosecution in this district, I don't know about prosecutions in other districts, but that is not a matter of whether it is valid on the face, and that is what we are talking about, whether the bill of information is valid upon its face.

He talks about interstate commerce, equal protection and due process clauses. Those are matters that of course would come up on the merits of the case, because this is a regular disturbing the peace statute; it doesn't say anything about interstate commerce; it doesn't say anything about facilities; it doesn't say anything about

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restrooms; it doesn't say anything about colored people or white people or segregation or integration or any of those things, and we are talking now about the charge and about the statute as to whether or not they are constitutional and we believe that they have met the constitutional tests.

THE COURT: I will take the matter under advisement because I want to study that statute.

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STATE OF LOUISIANA :
PARISH OF CADDO :

I, Hazel Autrey, Official Reporter First Judicial District Court in and for Parish of Caddo, State of Louisiana, hereby certify that the above and foregoing typewritten pages constitute a true and correct transcript of my tape recording of the proceedings had in the above entitled and numbered cause at the time and place set forth on page one hereof.

IN WITNESS WHEREOF, I hereunto set my hand, at my office in Shreveport, Louisiana, this the sixteenth day of August, A. D. 1961.

Hazel Autrey
Official Reporter
First Judicial District
Court of Louisiana

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